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No. 375

IN THE

Supreme Court of the United States

OCTOBER TERM .....

EX PARTE GEORGE

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM .....

EX PARTE GEORGE

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Sherman D. George prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Texas in this case.

I.

OPINIONS BELOW

The Order of the Tenth Judicial Court of Galveston County, Texas, granting the temporary injunction, is unreported. (App. 1-2)[1] The Opinion and Order of the Tenth Judicial District Court of Galveston County, Texas finding Petitioner in contempt, is unreported. (App. 3-18) The Opinion of the Supreme Court of Texas, declining to discharge Petitioner, is reported at 358 S.W. 2d 590. (App. 19-37) The dissent of the Chief Justice, concurred in by Associate Justice Norvell, is reported at 358 S.W. 2d p. 600 (App. 41-54).

[1] Explanatory Note: App. refers to the attached appendix. S.F.T.I. refers to the Statement of Facts of the Hearing for temporary injunction which is 94 pages long and incorporated between pages 8 and 9 of the Statement of Facts of the Contempt hearing. The Statement of Facts of the Contempt hearing will be referred to as S.F. The symbol Tr. refers to the transcript.

II.

JURISDICTION

The opinion of the Supreme Court of Texas was handed down and entered on January 3, 1962. Petitioner's Motion for Rehearing was overruled on May 30, 1962.

The jurisdiction of this Court is conferred by 28 USCA 1257. Although the injunction underlying the trial court's order of contempt is a temporary one, (compare *Montgomery Building, etc.* v. *Ledbetter Erc. Co.*, 344 U.S. 178 [1952]), the present habeas corpus proceeding is a distinct and independent suit in which all pertinent issues have been finally decided. By statute, the Supreme Court of Texas is vested with original jurisdiction to hear and decide habeas corpus cases. Vernon's Tex. Civ. Stat. Art. 1737. Therefore, the decision of the Supreme Court of Texas, denying to order release of Petitioner is a final judgment within the purview of Section 1257. See *In re Green*, 82 S. Ct. 1114 (1962); *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 565-68 (1947); *Bandini Petro. Co.* v. *Superior Court*, 284 U.S. 8 (1931).

It is significant that the only relief sought in the state court by The American Oil Company was an order to enjoin picketing. The temporary injunction, therefore, was not an order merely maintaining the status quo pending the determination of some other issue; rather, the temporary injunction, in substance, gave the company the relief that it sought. Compare *United States* v. *United Mine Workers*, 330 U.S. 258, 289-95 (1947).

III.

QUESTIONS PRESENTED

1. May a state court enjoin peaceful picketing which is arguable within the protection or prohibition of the Labor Management Relations Act?

2. Is a state statute constitutional which prohibits virtually all picketing?

IV.

STATUTORY PROVISIONS INVOLVED

Labor Management Relations Act of 1947, 61 Stat. 136, et seq., 29 U.S.C. 157, 158 (b)(4)(B). (App. 56-57). Acts 1947, 50th Leg., Ch. 138, p. 239, Vernon's Texas Civil Statutes Art. 5154d(4), (App. 57). First and Fourteenth Amendments to the Constitution of the United States.

V.

STATEMENT OF THE CASE

Petitioner, S. D. George, is the Galveston port agent of the National Maritime Union. (S.F.T.I. 66)[2] By this habeas corpus proceeding, he challenges the jurisdiction of the Tenth Judicial District Court of Galveston County, Texas, to enjoin the peaceful picketing by the National Maritime Union and its members of the property of The American Oil Company. The American Oil Company, is a Texas corporation which operates a refinery at Texas City, Texas, and which is wholly owned and completely controlled by American Oil Company, a Maryland corporation (S.F.T.I. 44-45). It is not contested that both the parent and the subsidiary companies are engaged in interstate commerce within the meaning of the Labor Management Relations Act. (Tr. 33-34)

On June 15, 1961, the collective bargaining agreement between the National Maritime Union and American Oil Company (the parent corporation), covering unlicensed members of the crews working aboard vessels of the Company, expired (S.F.T.I. 69-70). Negotiations for a new

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[2] See Footnote 1, *supra*, page 1.

contract had been fruitless, and the Union undertook to make public the labor dispute between it and American Oil Company. Pickets were posted at all ships operated by the company at whatever ports they could be found. At Texas City, pickets were placed at the six gates of the refinery of The American Oil Company (the subsidiary). The picketing at the premises of The American Oil Company was at all times peaceful, truthful and non-obstructive (S.F.T.I. 41). Although no National Maritime Union members worked within the 860-acre confines of the refinery, pipelines ran directly from it to the dock area at Texas City where American Oil Company vessel were loaded. (S.F.T.I. 35).

The American Oil Company (the subsidiary) took two separate courses of action to have the picketing removed. Alleging that four of the six gates at its picketed refinery were used exclusively by independent contractors, the subsidiary Company filed charges with the National Labor Relations Board, invoking its powers to prevent "secondary picketing" under the provisions of the Labor Management Relations Act, Section 8(b)(4)(B), 29 USCA 158(b)(4)(B). (S.F.T.I. 51). Pursuant to such charges, counsel of the Board sought an order from the federal court under Section 10l, 29 USCA 160 (l), enjoining the picketing at the "construction gates." This controversy was settled, however, and a stipulation filed in the District Court whereby the National Maritime Union agreed not to picket the construction gates as long as they were used exclusively by independent contractors. (App. 32).

As to the two remaining gates (Fifth Avenue gate and Grant Avenue gate), used by its employees engaged in the manufacturing and refining of its products shipped on the vessel of the parent corporation, the subsidiary company filed a complaint in the State District Court, contending that the picketing there was in violation of Art. 5154d, Section 4,

Vernon's Texas Civil Statutes,[3] in that a purpose of the picketing was to induce the maintenance and production employees working at the refinery (represented by the Oil, Chemical and Atomic Workers International Union, AFL-CIO) to strike in breach of the no strike clause contained in their collective bargaining agreement with the subsidiary Company. (Tr. 4, 5-6). It was not asserted by the subsidiary Company, nor was it later suggested, that the picketing was anything but peaceful and in compliance with the Texas statutes regulating picketing. See Vernon's Tex. Civ. Stat. Art. 5154(d) (1) and (2). The only relief sought in the state court was an injunction prohibiting the picketing. (Tr. 6-7). After a full and complete factual inquiry, the state court, on June 22, 1961, entered an order, in the form of a temporary injunction, granting the relief sought by the subsidiary Company. Although the evidence is undisputed that not one production or maintenance employee had honored the picket line (S.F.T.I. 59), the court found that continuation of the picketing would probably be more successful. (Tr. 33).

Thereafter, Petitioner, meaning no disrespect to the Court but merely doing what he thought best for his men (S.F. 43-44), picketed the refinery in violation of the temporary injunction. The sign he carried read,

> "NMU Members Will Not Sail Without A Contract This Protest Against the American Oil Company Only National Maritime Union of America, AFL-CIO",

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[3] Art. 5154d, Section 4, Vernon's Texas Civil Statutes, "It shall be unlawful for any person, singly or in concert with others, to engage in picketing, the purpose of which, directly or indirectly, is to secure the disregard, breach or violation of a valid subsisting labor agreement arrived at between an employer and the representatives designated or selected by the employees for the purpose of collective bargaining, or certified as the bargaining unit under the provisions of the National Labor Relations Act."

and the picketing continued from the afternoon of June 26, 1961, to the afternoon of June 27, 1961. As before, the picketing was truthful, peaceful and of no avail.

On June 27, 1961, the subsidiary Company filed a motion that Petitioner be held in contempt of the court's order. On July 3, 1961, a hearing was held, and three days later an order was entered adjudging Petitioner to be guilty of contempt. He was fined $100 and sentenced to three days in jail (Tr. 36), sentence to commence on July 10, 1961 (Tr. 36). On that day, Petitioner filed a petition for a Writ of Habeas Corpus in the Supreme Court of Texas. The decision of that court was handed down on January 3, 1962, upholding the jurisdiction of the lower court to issue the temporary injunction and declining to discharge your Petitioner. Petitioner's timely motion for rehearing was overruled on May 30, 1962, with the Chief Justice filing a written dissent, concurred in by Associate Justice Norvell. Thereafter, the court granted a stay in execution of the Writ of Commitment until such time as this Court disposes of the case (App. 55).

Petitioner has maintained throughout this litigation that the picketing complained of by The American Oil Company is arguably within the protection or prohibition of the Labor Management Relations Act and, therefore, without the ambit of state authority. (Motion to Dismiss, S.F.T.I. 48, 91 S.F. 50-51; Petition for Writ, p. 5; Motion for Rehearing, p. 2) (App. 57-60). Also, petitioner has contended that the injunction issued by the state court was in violation of rights guaranteed under the First and Fourteenth Amendments of the Constitution of the United States. (Petition for Writ, p. 7; Motion for Rehearing, p. 3) (App. 60-61).

Petitioner's motion to dismiss was overruled by the District Court, and the decision of the Supreme Court of Texas, upholding that decision, is squarely grounded on the view

that the picketing was neither prohibited nor protected by the Act.

VI.

REASONS RELIED ON FOR GRANTING THE WRIT

1. Petitioner respectfully contends that the decision of the Supreme Court of Texas that the State District Court had jurisdiction to enjoin the picketing by the National Maritime Union at the premises of The American Oil Company (the subsidiary) is in plain derogation of prior pronouncements of this Court. The guide lines for determining the extent to which a state court may exercise jurisdiction in the area of national labor relations are clearly laid down in *Marine Engineers' Beneficial Association* v. *Interlake SS Co.*, 82 S. Ct. 1237 (1962), *San Diego Building Trades Council, etc.* v. *Garmon*, 359 U.S. 236 (1959), and *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468 (1955).

As stated in the *Garmon* case: "When it is clear or may fairly be assumed that the activity which a State purports to regulate is protected by section 7 of the National Labor Relations Act, or constitutes an unfair labor practice under section 8, due regard for the federal enactment requires that state jurisdiction must yield. * * * It is not for us to decide [how] the National Labor Relations Board would have * * * decided these questions * * *. When an activity is arguably subject to section 7 or section 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board * * *." 359 U.S. at 244, 245. More concisely, "While the Board's decision is not the last word, it must assuredly be the first." *M.E.B.A., supra*, 82 S. Ct. at 1243.

In the *Weber* case, *supra*, 348 U.S. at 481 this Court said: "Where the facts reasonably bring the controversy within the sections (of the Labor Management Relations Act) prohibiting these practices, and where the conduct, if not

prohibited by the Federal Act, may be reasonably deemed to come within the protection afforded by the Act, the state court must decline jurisdiction in deference to the tribunal which Congress has selected for determining such issues in the first instances." See *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1 (1957); *Garner* v. *Teamsters, Chauffeurs & Helpers, etc.*, 346 U.S. 485 (1953).

Rightfully, this Court has been concerned that state regulation in this field might well disrupt the statutory scheme laid down by Congress. Where the activity sought to be controlled by a state is prohibited by the Labor Management Relations Act, the clash between the two areas of authority is imminent. "The conflict lies in remedies, not rights. * * * It must be remembered that Petitioner's state remedy was a suit for an injunction prohibiting the picketing. The Federal Board, if it should find a violation of the national Labor Management Relations Act, would issue a cease and desist order and perhaps obtain a temporary injunction to preserve the status quo. Or if it found no violation, it would dismiss the complaint, thereby sanctioning the picketing." *Garner* v. *Teamsters, Chauffeurs & Helpers, etc.*, 346 U.S. 485, 498-99 (1953). The Court concluded in the *Garner* case that to avoid facing a conflict "we would have to assume either that both authorities will always agree as to whether the picketing should continue, or that the state's temporary injunction will be dissolved as soon as the federal board acts. But experience gives no assurance of either alternative, and there is no indication that the statute left it open for such conflicts to arise." *Id.* at 499.

On the other hand, if the activity sought to be regulated by the state is protected by the Labor Management Relations Act, then to allow state regulation might well lead to a "frustration of national purposes." *San Diego Building Trade Councils, etc.* v. *Garmon, supra*, 359 U.S. at 244.

Applying these crieteria to the facts of the present case, it clearly appears that the controversy fell without the ambit of state authority and fell within the exclusive jurisdiction of the National Labor Relations Board. Indeed, pursuant to the Company's charge, the National Labor Relations Board accepted jurisdiction over such part of the controversy between the National Maritime Union and The American Oil Company as was submitted to it, by seeking an injunction on behalf of the Company to prohibit picketing at the "construction gates." This shows, to say the least, that the picketing at the two gates used by the subsidiary's employees was arguably subject to the jurisdiction of the Board. In the Supreme Court of Texas, the subsidiary Company sought to avoid this obvious conclusion by the argument that it was the primary employer of the National Maritime Union employees (Company's Brief, p. 14-17), and that, therefore, the Board would not have enjoined this picketing. This is precisely Petitioner's position, and the Company's argument shows that the conduct here regulated by the state was protected under Section 7 of the Labor Management Relations Act.

Moreover, as pointed out by the Chief Justice in his dissent in this case, the Company's assertion that it was the "primary" employer finds substantial support in decisions of the federal courts and the Board. For example, in *NLRB* v. *Condensor Corp. of America*, 128 F. (2d) 67, 71 (3rd Cir. 1942), the court held that a parent corporation was the employer of employees of a wholly owned subsidiary where the parent controlled the labor policies of the subsidiary, thus enabling the Board to issue a cease and desist order against the parent organization. See *NLRB* v. *Federal Engineering Co.*, 153 F. (2d) 233 (6th Cir. 1946); *NLRB* v. *National Garment Co.*, 166 F. (2d) 233 (8th Cir. 1948); *NLRB* v. *Somerset Classics*, 193 F. (2d) 613 (2nd Cir. 1952).

Likewise, in "secondary picketing" cases, judicial decisions have established that, where two companies are commonly owned and controlled and their operations are closely integrated, picketing by the employees of one, of the premises of the other, is not violative of section 8(b)(4)(B). See *Bachman Machine Co.* v. *NLRB*, 266 F. (2d) 599, 605 (8th Cir. 1959); *Milwaukee Plywood Co.* v. *NLRB*, 285 F. (2d) 325, 327 (7th Cir. 1960); *cf. J. G. Roy & Sons Co.* v. *NLRB*, 251 F. (2d) 771, 773-75 (1st Cir. 1958); *NLRB* v. *Truck Drivers & Helpers, etc.*, 228 F. (2d) 791, 797 (5th Cir. 1956). Clearly, an employer cannot derogate the rights afforded his employees under the Labor Management Relations Act by separating his company into two divisions. See *NLRB* v. *General Drivers, Warehousemen & Helpers, etc.*, 255 F. (2d) 205 (5th Cir. 1955). And the Board itself has long operated under the principle that, where two commonly owned and controlled companies engage in a "straight-line operation," picketing by a union representing employees of one company of the premises of the other is protected activity under Section 7. See *Irwin-Lions Lumber Co.*, 87 NLRB 54 (1949); *cf. Local 761, International Union of Electricians, etc.* v. *NLRB*, 366 U.S. 667, 681 (1961) ("normal operations" test in common situs cases).

In the present case, the parent corporation, with which the National Maritime Union admittedly had a labor dispute, governed not only the labor policies of The American Oil Company, but all of its policies of every nature. Also, the gasoline and other petroleum products refined at the Texas City plant were taken directly to the docks and there picked up by the vessels of the parent. In economic reality, the two corporations were one. Although this Court will not determine the question, is it not at least arguable that the picketing was protected activity?

The other side of the coin is that the activity here involved was secondary picketing under Section 8(b)(4)(B)

of the Act. If the subsidiary corporation is considered a neutral, and not connected with the operations of American Oil Company, then the picketing of its premises by the employees of American Oil Company was prohibited by that section of the Act. Under the findings of the sentencing court, the purpose of the picketing was to bring economic forces to bear upon The American Oil Company, thereby shutting off the supply of oil to the tankers of American Oil Company. Clearly, this was an effort on the part of the National Maritime Union to cause The American Oil Company to cease doing business with its parent corporation. Such conduct would be directly violative of Section 8(b)(4)(B) of the Act. See *Lebus* v. *International Brotherhood of Electrical Workers, etc.*, 192 F. Supp. 485, 488 (W.D. La. 1961).

This is not a case involving violence. Compare *International Union, etc.* v. *Russell*, 356 U.S. 634 (1958); *Youngdahl* v. *Rainfair, Inc.*, 355 U.S. 131 (1957). Nor does the present case involve repeated temporary work stoppages as in *International Union* v. *Wisconsin Employment Relations Board*, 336 U.S. 245 (1949). Nor does it involve a sit down strike as in *Southern SS Co.* v. *NLRB*, 316 U.S. 31 (1942). Nor is Petitioner's assertion of Board jurisdiction far fetched as was the case in *International Association of Machinist* v. *Gonzales*, 356 U.S. 617 (1958). Here the picketing was absolutely peaceful, unobstructive, and, indeed, of no avail. And, plainly, the picketing was arguably within the protection or prohibition of the Act.

Yet the Texas Court concluded: "We find no basis for denying to Texas the power, in governing her internal affairs, to regulate a course of conduct about which the National Labor Relations Board (had), at most, merely a 'peripheral concern'. * * * We find nothing in the Act which can be regarded as protecting concerted activities which

have as their purpose possible and probable inducement of breach of contract. The activities in the instant case, neither being protected nor prohibited by the Act, do not fall within any of the categories in which the United States Supreme Court thus far has said a State Court may not act." The Supreme Court of Texas failed to recognize that a state statute is invalid which derogates rights guaranteed by Congress under Section 7: See *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468, 474-75 (1955); *Garner* v. *Teamsters, etc.*, 346 U.S. 485, 500-01 (1953). In addition, it is noteworthy that the statute relied on by the Texas court to establish local jurisdiction is almost identical to the statute relied on by the Minnesota court in the MEBA case. In that case, this Court was not convinced that this was a sufficient basis upon which to ground state jurisdiction. And here, too, such a statute cannot vest the Texas court with jurisdiction otherwise lacking.

The American Oil Company lays much store in the fact that the Oil, Chemical, Atomic Workers Union (representing the maintenance and production employees of the subsidiary) could be sued, if it honored the picket line in breach of the no strike clause of the bargaining agreement between them. And it may well be that the state court would have jurisdiction to award damages, if it were proved that the OCAW had struck in violation of its collective bargaining agreement, thus causing injury to the subsidiary Company. However, it is clear that such a strike could not be enjoined. *Sinclair Refining Co.* v. *Atkinson*, 82 S. Ct. 1328 (1962). Moreover, it would be incongruous to say that the insertion of a no strike clause in the contract between OCAW and The American Oil Company could impede the rights of the National Maritime Union to peacefully picket the Company's premises.

In summary, the Texas courts assumed the function of the National Labor Relations Board by deciding in the first

instance that the Board would not take jurisdiction over the picketing. The undisputed facts show that the picketing here involved is arguably subject to the exclusive jurisdiction of the Board. The order granting the injunction is absolutely void, and Petitioner's violation of that order cannot be contemptuous. E.g., *Ex Parte Henry*, 215 S.W. (2d) 588, 598 (Tex. Sup. Ct. 1948); *Ex Parte Dilley*, 334 S.W. (2d) 425, 432 (Tex. Sup. Ct. 1960).

2. Respectfully it is submitted that the Texas statute relied on by the Texas court in enjoining the picketing violates Petitioner's rights under the First and Fourteenth Amendment of the United States Constitution.

Justice Jackson, concurring in *Thomas* v. *Collins*, 323 U.S. 516, 547 (1945), stated: "Free speech on both sides and for every faction on any side of the labor relation is to me a Constitutional and useful right." This principle, which had been applied to peaceful picketing in *Thornhill* v. *Alabama*, 310 U. S. 88 (1940), was later modified by this Court in a series of decisions ending in *International Brotherhood of Teamsters* v. *Vogt*, 354 U.S. 284 (1957).

However, it was expressly recognized in the *Vogt* case that a state may not constitutionally "enact blanket prohibitions against picketing." *Id.* at 295. The Texas statute provides: "It shall be unlawful for any person, singly or in concert with others, to engage in picketing, the purpose of which, directly or indirectly, is to secure the disregard, breach or violation of a valid subsisting labor agreement arrived at between an employer and the representatives designated or selected by the employees for the purpose of collective bargaining, or certified as the bargaining unit under the provisions of the National Labor Relations Act." Vernon's Tex. Civ. Stat. Art. 5154d(4). And Petitioner cannot see how this statute is anything but a blanket prohibition against picketing. The purpose of all picketing is to

invoke sympathy from employees, customers, etc., so that economic pressures will be brought to bear upon the employer. This sympathy is manifested by the working man by his refusal to cross a picket line. And, in effect, the statute prohibits all picketing where the employer has a bargaining agreement with some union, even though the picketers are not in that union or represented by it. This is the situation here, and Petitioner respectfully contends that the Texas statute is unconstitutional and void.

CONCLUSION

For all the foregoing reasons this petition for certiorari should be granted.

MANDELL & WRIGHT

By .....
Attorneys for Petitioner

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Houston 2, Texas

CERTIFICATE OF SERVICE

This is to certify that on the ..... day of ....., 1962, a true and correct copy of the foregoing was served upon Messrs. Armstrong, Bedford & Lambdin, 201 National Hotel Building, Galveston, Texas, and Messrs. Baker, Botts, Shepherd & Coates, Esperson Building, Houston, Texas, Attorneys for The American Oil Company, by placing the same in envelopes addressed to each of them, postage prepaid, by certified mail, return receipt requested, and depositing in the United States mails.

.....

No. 96,705

THE AMERICAN OIL COMPANY vs. NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, ET AL.	IN THE DISTRICT COURT OF GALVESTON COUNTY, TEXAS 10TH JUDICIAL DISTRICT

The application of The American Oil Company, plaintiff, for a temporary injunction having come on for hearing, came the defendants through their attorney of record, and came the plaintiff through its attorneys of record, and both sides announced ready for the hearing; the plaintiff presented its evidence, during the course of which the defendants made their plea in abatement which the Court took under advisement and thereafter the plaintiff presented the remainder of its evidence and rested; thereupon the defendants rested, and after both sides had rested the defendants presented their plea in abatement which, after consideration the Court overruled, and hereby overrules; and it appearing to this Court upon the evidence, pleadings, stipulations and statements and argument of counsel, and the Court so finding, that the following temporary injunction ought to be granted; it is therefore,

ORDERED, ADJUDGED AND DECREED that the Clerk forthwith issue a temporary injunction, restraining and enjoining NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, SHERMAN D. GEORGE, and all of the officers, agents, representatives and members of said National Maritime Union of America, AFL-CIO, and those acting in concert with them from picketing the refinery entrances located and known as the Ma Gate on Fifth Avenue South, and the Grant Avenue Parking Lot Gate on Grant Avenue, both in the City of Texas City, and County of Galveston, Texas, serving the refinery of The American Oil Company at Texas City, Texas, or in any other manner

attempting to secure the disregard, breach or violation by Oil, Chemical and Atomic Workers International Union, Local 4-449, its members and employees of The American Oil Company at Texas City, Texas, of the existing labor agreement between The American Oil Company and said Oil, Chemical and Atomic Workers International Union, Local 4-449, by causing or soliciting said employees to refuse to work or perform services for The American Oil Company at its Texas City, Texas, refinery, upon The American Oil Company executing in favor of the defendants, and filing with said Clerk, a corporate surety bond, good and sufficient, in the sum of $1,000.00, conditioned as provided by law.

It is further, ORDERED, ADJUDGED AND DECREED that the temporary injunction issued herein shall continue and remain in force and effect pending final trial hereof.

To all of which actions and judgment of the Court the defendants timely objected and excepted, and gave notice of appeal therefrom to the Court of Civil Appeals for the First Supreme Judicial District of Texas, sitting at Houston.

DONE this 22nd day of June, 1961, at 5:18 o'clock p.m.

/s/ DONALD M. MARHLE
Judge.

No. 96,705

THE AMERICAN OIL COMPANY, *Plaintiff* vs. NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, ET AL.	IN THE DISTRICT COURT OF GALVESTON COUNTY, TEXAS 10TH JUDICIAL DISTRICT

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER AND COMMITMENT.

On the 3rd day of July, 1961, came on for hearing the motion of THE AMERICAN OIL COMPANY RELATING to the alleged contempt and disobedience by SHERMAN D. GEORGE and NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, of this Court's prior order granting temporary injunction and of the writ of temporary injunction issued pursuant thereto, when came The American Oil Company through its attorneys of record, and came National Maritime Union of America, AFL-CIO through its attorney of record and came Sherman D. George in person and through his attorney of record, and all of said parties announced ready for the hearing; thereupon The American Oil Company introduced its evidence and rested; and National Maritime Union of America, AFL-CIO and Sherman D. George thereupon moved for a dismissal of the motion relating to such alleged contempt and disobedience on the ground of want of jurisdiction in or power of this Court to render the order granting the temporary injunction or to cause to be issued the writ of temporary injunction for the alleged violation of which the order of contempt is sought, which motion for dismissal was, and the same is hereby DENIED: whereupon National Maritime Union of America, AFL-CIO and Sherman D. George rested.

After considering The American Oil Company's motion alleging that Sherman D. George and National Maritime Union of America, AFL-CIO are in contempt of court, and the lawful evidence, and stipulations of the parties hereto, the Court made, and hereby makes the following:

FINDINGS OF FACTS

The American Oil Company on the one hand, and Sherman D. George and National Maritime Union of America, AFL-CIO (hereafter called the N. M. U.) on the other, have validly stipulated for the purposes of this hearing that the following facts are true, and the Court hereby finds that the following facts are true:

1.

On June 22, 1961, in the cause numbered and styled as above set forth, this District Court of Galveston County, Texas, 10th Judicial District, after due and adequate notice to all parties, in open court conducted a hearing on the application of The American Oil Company for a temporary injunction against the defendants named and designated in said application, being the N. M. U., Sherman D. George, and all of the officers, agents, representatives and members of the N. M. U., and those acting in concert therewith, at which hearing said defendants were represented by counsel, and the defendant, Sherman D. George, then and now Port Agent for the N. M. U., and a member, agent and representative thereof, was personally present throughout said hearing and participated and as a witness testified therein.

2.

At the conclusion of said hearing referred to in 1. above, and after the plaintiff and the defendants had rested their

respective cases, at 5:18 p.m., on June 2, 1961, in open court this Court rendered its order granting temporary injunction pursuant to the aforesaid application for temporary injunction, the exact terms and provisions of which order granting temporary injunction are correctly set forth in the certified copy of the Writ of Temporary Injunction which is attached hereto as Exhibit "A".

3.

At the time the order granting temporary injunction referred to in 2. above was in open court rendered by the Court, Sherman D. George was personally present in the court room, and Sherman D. George fully understood the provisions and effect of, and the reasons for, the aforesaid order granting temporary injunction.

4.

Subsequent to rendition of the order granting temporary injunction referred to in 2. above, and at approximately 5:30 p.m., on June 22, 1961, The American Oil Company filed with the District Clerk of Galveston County, Texas, a proper bond in all respects complying with the provisions of the order granting temporary injunction referred to in 2. above, which was duly approved and filed by the District Clerk at the time and on the date above stated, and Sherman D. George and the N. M. U. were notified to this effect by their attorney prior to 11:00 p.m., on June 23, 1961.

5.

Thereafter, pursuant to the provisions of the order granting temporary injunction referred to in 2. above, on June 23, 1961, the District Clerk of Galveston County, Texas, under his lawful seal duly issued and at 11:54 o'clock A.M.,

on that date placed in the hand of J. B. Kline, Sheriff of Galveston County, Texas, for separate service on the N. M. U. and Sherman D. George, a writ of temporary injunction, a true copy of which, with a true copy of the said Sherig's proper and true return thereon, duly certified, are attached as Exhibit "A".

6.

The writ of temporary injunction referred to in 5. above in every respect fully conforms and complied with the Court's order granting temporary injunction referred to in 2. above.

7.

At 2:55 o'clock p.m., on June 23, 1961, R. F. Nunn, a duly authorized Deputy of J. B. Kline, duly elected and qualified Sheriff of Galveston County, Texas, personally served a true copy of the aforesaid writ of temporary injunction referred to in 5. above on the N.M.U., and a similar copy on Sherman D. George, by personally handing both of said copies to Sherman D. George at Galveston, Texas, Sherman D. George then being Port Agent at Galveston of the N.M.U. and as such being a proper agent for service of such writ on the N.M.U.

8.

Subsequent to the service on him of the writ of temporary injunction, as referred to in 7. above, and on June 23, 1961, Sherman D. George read the provisions of the writ of temporary injunction and fully understood the provisions thereof; and thereafter, but prior to June 27, 1961, Sherman D. George publicly announced in effect that he intended to violate the provisions of the aforesaid temporary injunction by picketing at The American Oil Company refinery at Texas City because he did not believe that this Court had

jurisdiction to issue the order granting the temporary injunction.

9.

Thereafter, and without any inducement or agreement thereto by The American Oil Company, at approximately 3:40 o'clock, P.M., on the 27th day of June, 1961, Sherman D. George went to The American Oil Company refinery entrance, located at and known as the Main Gate on Fifth Avenue South, in the City of Texas City, Galveston County, Texas, serving the refinery of The American Oil Company at Texas City, Texas, and picketed that refinery entrance by repeatedly and continuously walking back and forth on the roadway across and in close proximity in front of that refinery entrance, while carrying and displaying a large sign on which the following words were printed in large and clearly legible letters:

> "N M U MEMBERS WILL NOT SAIL WITHOUT A CONTRACT. THIS PROTEST AGAINST THE AMERICAN OIL COMPANY. ONLY NATIONAL MARITIME UNION OF AMERICA, AFL-CIO",

which picketing Sherman D. George continued without interruption until approximately 4:43 o'clock, p.m., June 27, 1961; and which action as described in this Paragraph 9. was, and was then known and intended by Sherman D. George to be, in direct and substantial violation and disobedience of the express provisions of the court order granting the temporary injunction as referred to in 2. above and of the writ of temporary injunction referred to in 5. above, wherein such picketing at that place by Sherman D. George and/or the N.M.U. is explicitly temporarily enjoined by the following provision of the aforesaid Writ of Temporary Injunction:

"NOW, THEREFORE, YOU THE SAID National Maritime Union of America, AFL-CIO, Sherman D. George, and all of the officers, agents, representatives and members of said National Maritime Union of America, AFL-CIO, and those acting in concert with you, are hereby restrained and enjoined from picketing the refinery entrances located and known as the Main Gate on Fifth Avenue South, and the Grant Avenue Parking Lot Gate on Grant Avenue, both in the City of Texas City, and County of Galveston, Texas, serving the refinery of The American Oil Company at Texas City, Texas . . .".

10.

At the times referred to in 9. above the court order granting temporary injunction referred to in 2. above and the writ of temporary injunction referred to in 5, above, including the injunction against the picketing described in 9 above, were, and Sherman D. George know that they were, then in full force and effect, neither said order granting the temporary injunction nor said writ of temporary injunction having then been modified or set aside either in whole or in part.

11.

Thereafter, at approximately 4:45 o'clock p.m., on June 27, 1961, The American Oil Company filed in this cause with the District Clerk of Galveston County, Texas, its motion and affidavit, in due and proper form, setting out the above facts and complaining of the aforesaid violation and disobedience of the aforesaid temporary injunction by Sherman D. George and the N. M. U., which motion and affidavit in every factual respect of form and substance complies with the provisions of Rule 692 of the Texas Rules of Civil Procedure, it being stipulated that said motion and affidavit sufficiently allege all of the facts herein stipulated. Said

motion and affidavit were filed and presented to this Court by The American Oil Company as promptly as the circumstances reasonably permitted.

12.

Upon the motion and affidavit referred to in 11 above being presented this Court duly rendered its proper order directing the District Clerk of Galveston County, Texas, to issue and cause to be served on Sherman D. George and the N. M. U. a show cause order requiring Sherman D. George and the N. M. U. to appear before this Court on the 3rd day of July, 1961, at 10:00 o'clock a.m., and show cause why they should not be adjudged guilty of contempt of this Court as alleged in the aforesaid motion and affidavit referred to in 11. above, and said District Clerk did duly issue said show cause order in accordance with the provisions of the Court's aforesaid order, and said show cause order with a certified copy of the aforesaid motion and affidavit and court order were duly served on Sherman D. George and the N. M. U. on June 28, 1961.

13.

Sherman D. George and the N. M. U. have had adequate and proper notice of this hearing, and sufficient time to prepare therefor.

14.

In all factual respects all procedural prerequisites relating to issuance and service of process on the defendants relating to the hearing on the temporary injunction, to the rendition and entry on the minutes of the Court order referred to in 2. above, the filing and approval of the bond referred to in 4. above, the issuance and service and return thereon of the writ of temporary injunction referred to in 5.

above, the filing of the motion and affidavit referred to in 11. above, and rendition and entry on the Minutes of the court order referred to in 12. above, and the issuance, service and return thereon of the show cause order referred to in 12. above, have in every manner been fully complied with.

15.

The Court further finds that there is in the record before the Court no circumstance in mitigation of the actions of Sherman D. George as found in 9. above.

16.

The Court further finds that the following facts were true on June 20, 1961, at the time The American Oil Company filed in the above numbered and styled cause its petition seeking the temporary injunction that is involved in this hearing, and were true on June 22, 1961, at the time of the hearing on the application for temporary injunctions, and at the time of the issuance and service on Sherman D. George and the N. M. U. of the writ of temporary injunction that is involved in this hearing, and were true at all intermediate times and at all other times material to the issues involved in this hearing:

a. The N. M. U. is and was an unincorporated voluntary association of members operating as a labor union, of which Sherman D. George was a member and its Port Agent in the City and County of Galveston, Texas, having authority to supervise the affairs, including picketing, of the N. M. U. in Galveston County, Texas, the said Sherman D. George then and now being a resident citizen of Galveston County, Texas.

b. The American Oil Company is and was a Texas corporation which owned and operated a refinery located on

approximately 860 acres of land at Texas City, Galveston County, Texas, the entirety of which is surrounded by a fence, and entrance to that refinery could be gained only through six certain gates. Two of those gates were used exclusively by employees of The American Oil Company, which gates were located at and were known as the Main Gate on Fifth Avenue South, and the Grant Avenue Parking Lot Gate on Grant Avenue, both in Texas City, Texas. Of the four remaining gates, one or more were used by employees of independent contractors engaged in construction work on the refinery property.

c. The American Oil Company had in its employ approximately 1,500 employees working for its at the aforesaid refinery of whom approximately 1,100 were classified as operation and maintenance employees, or production and maintenance employees, which is one and the same. The approximate daily payroll of the approximately 1,100 operation and maintenance employees was $25,000.00 per day.

d. Oil, Chemical and Atomic Workers International Union, Local 4-449 (hereafter called O.C.A.W.) was a labor union which had been selected by the operation and maintenance employees of The American Oil Company at its Texas City refinery for the purpose of collective bargaining.

e. There was a valid and subsisting labor agreement which had been arrived at between The American Oil Company and O.C.A.W. relating to the approximately 1,100 operation and maintenance employees of The American Oil Company at its Texas City refinery, which agreement was entered into on January 8, 1960 and will be effective until at least June 30, 1962.

f. There was no labor dispute between The American Oil Company and O.C.A.W. or the operation and maintenance employees of The American Oil Company represented by O.C.A.W.

g. The N.M.U. had its pickets on 24-hour duty posted at all six of the gates at the entrances to The American Oil Company refinery at Texas City, including at the Main Gate and the Grant Avenue Parking Lot Gate, which gates were used exclusively by The American Oil Company refinery employees, including the approximately 1,100 operation and maintenance employees working for The American Oil Company under the aforesaid valid subsisting labor agreement.

h. A primary purpose of the N.M.U. and of Sherman D. George, the Port Agent of N.M.U. whose duties included supervising N.M.U. pickets in Galveston County, Texas, in posting pickets at the Main Gate and at the Grant Avenue Parking Lot Gate of the American Oil Company refinery at Texas City as referred to in g. above, and a natural and probable consequence thereof, was to secure the disregard, breach or violation by O.C.A.W. and by all or substantial numbers of the operation and maintenance employees of The American Oil Company at its Texas City refinery of the valid subsisting labor agreement referred to in e. above.

i. At the time the order granting the temporary injunction referred to in Finding 2. above was rendered, and at the time of the issuance and service of the writ of temporary injunction referred to in Finding 5. above, there was a clear and present danger that the picketing of the Main Gate and Grant Avenue Parking Lot Gate would secure the disregard, breach or violation of the aforesaid labor agreement between The American Oil Company and O.C.A.W. by O.C.A.W. and by all or substantial numbers of The Ameri-

can Oil Company employees covered by that labor agreement, and in the event of such disregard, breach or violation immediate and irreparable harm and damage would have resulted to The American Oil Company.

j. The temporary injunction against picketing the Main Gate and the Grant Avenue Parking Lot Gate of The American Oil Company refinery at Texas City did not in any manner interfere with any of the defendants picketing the other four gates at that refinery.

k. The American Oil Company is a wholly owned subsidiary of American Oil Company, a Maryland corporation, and said American Oil Company, a Maryland corporation, directs and controls all of the activities of said The American Oil Company and its Texas City, Texas, Refinery. At all times material hereto, American Oil Company, a Maryland corporation, was engaged in a labor dispute with its employees represented by the National Maritime Union of America, AFL-CIO. The American Oil Company, a Texas corporation, and American Oil Company, a Maryland corporation, at all times material hereto, were engaged in commerce within the meaning of the National Labor Relations Act, as amended, and met the existing monetary jurisdictional standards of the National Labor Relations Board.

CONCLUSIONS OF LAW

This Court draws the following conclusions of law applicable to the facts as above found:

1. This Court has jurisdicition of the subject matter of the contempt motion before this Court, and of the parties thereto.

2. This Court has, and since the inception of this suit has had, jurisdiction of the subject matter of this suit by

The American Oil Company against the parties defendant therein, and at the time of the hearing on the application for temporary injunction had and has retained personal jurisdiction over the parties thereto.

3. The labor agreement between The American Oil Company and Oil, Chemical and Atomic Workers International Union, Local 4-449, referred to in Finding of Fact 16.e. above was a valid subsisting labor agreement within the meaning of Article 5154d, Sec. 4, Vernon's Tex. Rev. Civ. Stats., Ann.

4. The picketing at the Main Gate and at the Grant Avenue Parking Lot Gate was in direct violation of Article 5154d, Sec. 4, Vernon's Tex. Rev. Civ. Stats., Ann., in that it was, within the language and meaning of that statute:

> ". . . picketing, the purpose of which, directly or indirectly, is to secure the disregard, breach or violation of a valid subsisting labor agreement arrived at between an employer and the representative designated or selected by the employees for the purpose of collective bargaining, or certified as the bargaining unit under the provisions of the National Labor Relations Act",

and as such was within the jurisdiction of this Court to prohibit by temporary injunction.

5. The actions of Sherman D. George, as found in Finding of Fact 9. above, constitute a disobedience by Sherman D. George of the lawful writ of injunction duly issued by the District Clerk of Galveston County, Texas, pursuant to the valid subsisting order of this Court, as the term "disobedience of an injunction" is used in Rule 692 of Texas Rules of Civil Procedure.

6. The acts of disobedience referred to in Conclusion 5. above constitute a contempt of this Court by Sherman D. George within the meaning of Texas Rules of Civil Procedure, Rule 692, and Article 1911, Vernon's Tex. Rev. Civ. Stats., Ann.

7. The motion of The American Oil Company and the affidavit therein contained are in every respect legally sufficient, and all procedural requirements have in every respect lawfully been complied with, so as in every legal aspect to authorize this hearing, and the findings, conclusions, orders and commitment herein provided.

ORDERS AND COMMITMENT

On the basis of the motion of The American Oil Company and affidavit therein contained, the evidence, stipulations of the parties, and the law of the case, it is accordingly,

ORDERED, ADJUDGED AND DECREED that Sherman D. George be and he is hereby adjudged guilty of contempt of this Court by intentional and wilful disobedience and violation of a valid subsisting writ of temporary injunction lawfully issued and theretofore duly served upon him pursuant to a lawful subsisting order of this Court, in that Sherman D. George, while said writ of temporary injunction was in full force, from approximately 3:40 o'clock p.m. until approximately 4:43 o'clock p.m., both on the 27th day of June, 1961, picketed The American Oil Company refinery entrance located at and known as the Main Gate on Fifth Avenue South in the City of Texas City, Galveston County, Texas, by the said Sherman D. George repeatedly and continuously walking back and forth on the roadway across and in close proximity in front of that refinery entrance while carrying and displaying a large sign on which

the following words were printed in large and clearly legible letters.

> "N M U MEMBERS WILL NOT SAIL WITHOUT A CONTRACT. THIS PROEST AGAINST THE AMERICAN OIL COMPANY ONLY NATIONAL MARITIME UNION OF AMERICA, AFL-CIO",

such picketing at that time and place by Sherman D. George having been explicitly temporarily enjoined by the following provisions of the aforesaid writ of temporary injunction:

> "NOW, THEREFORE, YOU THE SAID National Maritime Union of America, AFL-CIO, Sherman D. George, and all of the officers, agents, representatives and members of said National Maritime Union of America, AFL-CIO, and those acting in concert with you, are hereby restrained and enjoined from picketing the refinery entrances located and known as the Main Gate on Fifth Avenue South, and the Grant Avenue Parking Lot Gate on Grant Avenue, both in the City of Texas City, and County of Galveston, Texas, serving the refinery of The American Oil Company at Texas City, Texas . . .",

it is further

ORDERED, ADJUDGED AND DECREED that in punishment for his aforesaid contempt of this Court Sherman D. George be imprisoned in the county jail of Galveston County, Texas, without bail, for a period of seventy-two (72) hours, or until he be discharged by further order of this Court, and fined the sum of ONE HUNDRED DOLLARS ($100.00), such fine to be had and recovered from Sherman D. George by the State of Texas, and to be paid in lawful money of the United States of America to the Sheriff of Galveston County, Texas, for the use and bene-

fit of the State of Texas; and the District Clerk of Galveston County, Texas, is hereby ordered forthwith to issue a proper Writ of Commitment directed to the Sheriff or any Constable within the State of Texas, directing him at 10:00 o'clock a.m., on the 10th day of July, 1961, or as soon thereafter as can be, to take the body of Sherman D. George and safely keep him, the said Sherman D. George, in custody in the county jail of Galveston County, Texas, in the City and County of Galveston, Texas, for the period of seventy-two (72) hours and until the aforesaid $100.00 fine is paid; to which writ shall be attached a certified copy of this judgment and order; it is further

ORDERED, ADJUDGED AND DECREED that National Maritime Union of America, AFL-CIO be, and it is hereby adjudged NOT GUILTY OF CONTEMPT of this Court as alleged in the motion for contempt on which this hearing is held; to which action of the Court The American Oil Company duly and timely made known its objections and exceptions.

Costs of this contempt proceeding are adjudged against Sherman D. George, for which let execution issue.

TO ALL OF WHICH findings, conclusions, orders, commitment, actions and judgment of the Court Sherman D. George duly and timely made known his objections and exceptions, except that the said Sherman D. George, through his attorney of record, in open Court agreed that his commitment may be delayed until 10:00 o'clock a.m., on July 10, 1961, such delay being to serve his and his attorney's convenience, and Sherman D. George, through his attorney of record in open Court waived the service on him of any copy of the writ of commitment or of this judgment and order.

RENDERED this 6th day of July, 1961, at 4:45 o'clock P.M.

DONALD M. MARKLE,
Judge

APPROVED AS TO FORM ONLY:

MANDELL & WRIGHT

By F. S. GROSSBERG
Attorneys for Sherman D. George and National Maritime Union of America, AFL-CIO

BAKER, BOTTS, ANDREWS & SHEPHERD
ARMSTRONG, BEDFORD & LAMBDIN

By GRIFFITH D. LAMBDIN
Attorneys for The American Oil Company

IN THE

Supreme Court of Texas

No. A-8518

EX PARTE

SHERMAN D. GEORGE

ORIGINAL HABEAS CORPUS PROCEEDING

This is an original habeas corpus proceeding wherein petitioner S. D. George seeks release from a conviction for contempt. George claims that the temporary injunction granted by the 10th Judicial District Court of Galveston County, Texas, is and was void because the Court was without jurisdiction to order the injunction. George contends, therefore, that his single act of picketing in "violation" of the injunction cannot be made the basis of a contempt conviction, since it was, at most, a "violation" of a void order.

The contempt proceeding originated in the district court upon the motion of The American Oil Company, wherein it was alleged that George and National Maritime Union of America, AFL-CIO, were in contempt and disobedience of the Court's prior order granting a temporary injunction and of the writ of temporary injunction issued pursuant thereto.

On July 3, 1961, the hearing on the motion proceeded to trial. The matter was submitted to the Court on the pleadings and stipulated facts.

After considering the motion alleging that George and National Maritime Union of America, AFL-CIO, were in

contempt of court, and the lawful evidence, and stipulation of the parties, the Court adjudged the Union not guilty of contempt. Although American duly excepted to such action of the Court, the question so far as the Union is concerned is not before this Court for review.

However, the Court ordered, adjudged, and decreed George guilty of contempt of court "* * * by intentional and wilful disobedience and violation of a valid subsisting writ of temporary injunction lawfully issued and theretofore duly served upon him pursuant to a lawful subsisting order of this Court, in that Sherman D. George, while said writ of temporary injunction was in full force, * * * picketed The American Oil Company refinery entrance located at and known as the Main Gate on Fifth Avenue South in the City of Texas City, Galveston County, Texas, by the said Sherman D. George repeatedly and continuously walking back and forth on the roadway across and in close proximity in front of that refinery entrance while carrying and displaying a large sign on which the following words were printed in large and clearly legible letters:

> 'N. M. U. Members will not sail without a contract. This protest against The American Oil Company only. NATIONAL MARITIME UNION OF AMERICA, AFL-CIO.'"

The Court found that such picketing at that time by George had been explicitly enjoined by the following provisions of the temporary injunction:

> "NOW, THEREFORE, you the said National Maritime Union of America, AFL-CIO, Sherman D. George, and all of the officers, agents, representatives and members of said National Maritime Union of America, AFL-CIO, and those acting in concert with you, are hereby restrained and enjoined from picketing the refinery entrances located and known as the Main Gate on Fifth Avenue South, and the Grant Avenue Park-

ing Lot Gate on Grant Avenue, both in the City of Texas City, and County of Galveston, Texas, serving the refinery of The American Oil Company at Texas City, Texas, * * *."

The pertinent findings of fact by the trial court based upon the record and the stipulated facts by the parties are these:

"3.

"At the time the order granting temporary injunction referred to in 2. above was in open court rendered by the Court, Sherman D. George was personally present in the court room, and Sherman D. George fully understood the provisions and effect of, and the reasons for, the aforesaid order granting temporary injunction."

"7.

"At 2:55 o'clock p.m., on June 23, 1961, R. F. Nunn, a duly authorized Deputy of J. B. Kline, duly elected and qualified Sheriff of Galveston County, Texas, personally served a true copy of the aforesaid writ of temporary injunction referred to in 5. above on the N. M. U., and a similar copy on Sherman D. George, by personally handing both of said copies to Sherman D. George at Galveston, Texas, Sherman D. George then being Port Agent at Galveston of the N. M. U. and as such being a proper agent for service of such writ on the N. M. U.

"8.

"Subsequent to the service on him of the writ of temporary injunction, as referred to in 7. above, and on June 23, 1961, Sherman D. George read the provisions of the writ of temporary injunction and fully understood the provisions thereof; and thereafter, but prior to June 27, 1961, Sherman D. George publicly announced in effect that he intended to violate the provisions of the aforesaid temporary injunction by picketing at The American Oil Company refinery at Texas

City because he did not believe that this Court had jurisdiction to issue the order granting the temporary injunction.

"9.

"Therefore, and without any inducement or agreement thereto by The American Oil Company, * * * on the 27th day of June, 1961, Sherman D. George went to The American Oil Company refinery entrance, located at and known as the Main Gate on Fifth Avenue South', and picketed that refinery gate as heretofore indicated.

"10.

George at all times knew that the Court's order and the temporary injunction were in effect and had not been modified or set aside either in whole or in part.

"15.

"The Court further finds that there is in the record before the Court no circumstance in mitigation of the actions of Sherman D. George * * *.

"16.

"The Court further finds that the following facts were true on June 20, 1961, at the time The American Oil Company filed in the above numbered and styled cause its petition seeking the temporary injunction that is involved in this hearing, and were true on June 22, 1961, at the time of the hearing on the application for temporary injunction, and at the time of the issuance and service on Sherman D. George and the N. M. U. of the writ of temporary injunction that is involved in this hearing, and were true at all intermediate times and at all other times material to the issues involved in this hearing:

"a. The N. M. U. is and was an unincorporated voluntary association of members operating as a labor union, of which Sherman D. George was a member and its Port Agent in the City and County of Galveston,

Texas, having authority to supervise the affairs, including picketing, of the N. M. U. in Galveston County, Texas, the said Sherman D. George then and now being a resident citizen of Galveston County, Texas.

"b. The American Oil Company is and was a Texas corporation which owned and operated a refinery located on approximately 860 acres of land at Texas City, Galveston County, Texas, the entirety of which is surrounded by a fence, and entrance to that refinery could be gained only through six certain gates. Two of those gates were used exclusively by employees of The American Oil Company, which gates were located at and were known as the Main Gate on Fifth Avenue South, and the Grant Avenue Parking Lot Gate on Grant Avenue, both in Texas City, Texas. Of the four remaining gates, one or more were used by employees of independent contractors engaged in construction work on the refinery property.

"c. The American Oil Company had in its employ approximately 1,500 employees working for it at the aforesaid refinery, of whom approximately 1,100 were classified as operation and maintenance employees, or production and maintenance employees, which is one and the same. The approximate daily payroll of the approximately 1,100 operation and maintenance employees was $25,000.00 per day.

"d. Oil, Chemical and Atomic Workers International Union, Local 4-449 (hereafter called O.C.A.W.) was a labor union which had been selected by the operation and maintenance employees of The American Oil Company at its Texas City refinery for the purpose of collective bargaining.

"e. There was a valid and subsisting labor agreement which had been arrived at between The American Oil Company and O.C.A.W. relating to the approximately 1,100 operation and maintenance employees of The American Oil Company at its Texas City refinery, which agreement was entered into on January 8, 1960, and will be effective until at least June 30, 1962.

"f. There was no labor dispute between The American Oil Company and O.C.A.W. or the operation and maintenance employees of The American Oil Company represented by O.C.A.W.

"g. The N. M. U. had its pickets on 24-hour duty posted at all six of the gates at the entrances to The American Oil Company refinery at Texas City, including at the Main Gate and the Grant Avenue Parking Lot Gate, which gates were used exclusively by The American Oil Company refinery employees, including the approximately 1,100 operation and maintenance employees working for The American Oil Company under the aforesaid valid subsisting labor agreement.

"h. A primary purpose of the N. M. U. and of Sherman D. George, the Port Agent of N. M. U. whose duties included supervising N M. U. pickets in Galveston County, Texas, in posting pickets at the Main Gate and at the Grant Avenue Parking Lot Gate of The American Oil Company refinery at Texas City as referred to in g. above, and a natural and probable consequence thereof, was to secure the disregard, breach or violation by O.C.A.W. and by all or substantial numbers of the operation and maintenance employees of The American Oil Company at its Texas City refinery of the valid subsisting labor agreement referred to in e. above.

"i. At the time the order granting the temporary injunction referred to in Finding 2. above was rendered, and at the time of the issuance and service of the writ of temporary injunction referred to in Finding 5. above, there was a clear and present danger that the picketing of the Main Gate and Grant Avenue Parking Lot Gate would secure the disregard, breach or violation of the aforesaid labor agreement between The American Oil Company and O.C.A.W. by O.C.A.W. and by all or substantial numbers of The American Oil Company employees covered by that labor agreement, and in the event of such disregard, breach or violation immediate and irreparable harm and damage would have resulted to The American Oil Company.

"j. The temporary Injunction against picketing the Main Gate and the Grant Avenue Parking Lot Gate of The American Oil Company refinery at Texas City did not in any manner interfere with any of the defendants picketing the other four gates at that refinery.

"k. The American Oil Company is a wholly owned subsidiary of American Oil Company, a Maryland corporation, and said American Oil Company, a Maryland corporation, directs and controls all of the activities of said The American Oil Company and its Texas City, Texas, Refinery. At all times material hereto, American Oil Company, a Maryland corporation, was engaged in a labor dispute with its employees represented by the National Maritime Union of America, AFL-CIO. The American Oil Company, a Texas corporation, and American Oil Company, a Maryland corporation, at all times material hereto, were engaged in commerce within the meaning of the National Labor Relations Act, as amended, and met the existing monetary jurisdictional standards of the National Labor Relations Board."

The Court filed Conclusions of Law as follows:

"1. This Court has jurisdiction of the subject matter of the contempt motion before this Court, and of the parties thereto.

"2. This Court has, and since the inception of this suit has had, jurisdiction of the subject matter of this suit by The American Oil Company against the parties defendant therein, and at the time of the hearing on the application for temporary injunction had and has retained personal jurisdiction over the parties thereto.

"3. The labor agreement between The American Oil Company and Oil, Chemical and Atomic Workers International Union, Local 4-449, referred to in Finding of Fact 16.e. above was a valid subsisting labor agreement within the meaning of Article 5154d, Sec. 4, Vernon's Tex. Rev. Civ. Stats., Ann.

"4. The picketing at the Main Gate and at the Grant Avenue Parking Lot Gate was in direct violation of Article 5154d, Sec. 4, Vernon's Tex. Rev. Civ. Stats., Ann., in that it was, within the language and meaning of that statute,

"* * * picketing, the purpose of which, directly or indirectly, is to secure the disregard, breach or violation of a valid subsisting labor agreement arrived at between an employer and the representative designated or selected by the employees for the purpose of collective bargaining, or certified as the bargaining unit under the provisions of the National Labor Relations Act", and as such was within the jurisdiction of this Court to prohibit by temporary injunction.

"5. The actions of Sherman D. George, as found in Finding of Fact 9. above, constitute a disobedience by Sherman D. George of the lawful writ of injunction duly issued by the District Clerk of Galveston County, Texas, pursuant to the valid subsisting order of this Court, as the term 'disobedience of an injunction' is used in Rule 692 of Texas Rules of Civil Procedure.

"6. The acts of disobedience referred to in Conclusion 5. above constitute a contempt of this Court by Sherman D. George within the meaning of Texas Rules of Civil Procedure, Rule 692, and Article 1911, Vernon's Tex. Rev. Civ. Stats., Ann.

"7. The motion of The American Oil Company and the affidavit therein contained are in every respect legally sufficient, and all procedural requirements have in every respect lawfully been complied with, so as in every legal aspect to authorize this hearing, and the findings, conclusions, orders and commitment herein provided."

George contends that the findings of fact by the trial court based largely upon stipulated facts, demonstrate conclusively that both Relator's conduct made the basis of his

conviction for contempt, and that of other pickets, previously made the basis for the temporary injunction he "violated", are *arguably* within Section 7[1] or Section 8[2] of 29 U.S.C.A., the National Labor Management Relations Act. He argues that conduct which arguably is either within the protection or the prohibition of the National Labor Management Relations Act lies in an area preempted by the United States and therefore is beyond the power of a state court to enjoin. However, George does not direct our attention to any particular part of either Section 7 or Section 8 of the Act which arguably embraces his activities, and we find none. A bare assertion of preemption does not deprive a state court of jurisdiction. See Retail Clerks Union v. Superior Court, 52 Cal. 2d 222, 339 P. 2d 839 (1959), Cert. den. 361 U.S. 864 (1959). It is well settled that labor activity neither protected nor prohibited by the National Labor Relations Act is within the

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[1] §7 "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3)."

[2] §8 "(b) It shall be an unfair labor practice for a labor organization or its agents —

* * * *

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: * * *

"(B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title; * * *."

power of the states to regulate by injunction. See Auto Workers v. Wisconsin Board, 336 U.S. 245 (1949); Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955), 75 S. Ct. 480, 99 L. Ed. 546; Office Employees International Union v. Houston Lighting & Power Company, Tex. Civ. App. (1958), 314 S.W. 2d 315, er, ref. n.r.e.

When, in a case such as we have here, the plaintiff alleges that the picketing sought to be enjoined is neither protected nor prohibited by the National Labor Relations Act, it is the duty of the trial court to determine initially whether it has jurisdiction. Ex Parte Twedell, supra. The state courts in determining the question of whether activity sought to be enjoined falls within the neither-protected nor-prohibited category necessarily must be guided by certain standards. The United States Supreme Court in the "Second Garmon Decision", Building Trades Council v. Garmon, 359 U.S. 236, 79 S. Ct. 773, 780, 3 L. Ed. 2d 775, specified the standards to be followed in determining this question. Under these standards, the state courts are to determine that they have no jurisdiction of labor activity which is "*arguably* subject to §7 or §8 of the Act." [Emphasis added]. Writ of Certiorari, 357 U.S. 925, 2 L. Ed. 1369, 78 S. Ct. 1371, was granted in the "Second Garmon Case" to determine whether a California court had jurisdiction to award damages arising out of peaceful union activity which it could not enjoin. The court stated that the issue before it was a variant of a familiar theme. The problems presented in cases beginning with Allen Bradley Local, U.E.R.M.W. v. Wisconsin Employment Relations Board, 315 U.S. 740, 860 L. Ed. 1154, 62 S. Ct. 820, were reviewed. The court recognized that many of these problems probably could not have been foreseen by the Congress. The court, in reaffirming what it had said in Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 99 L. Ed. 546, 75 S. Ct. 480, said:

"When it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by §7 of the National Labor Relations Act, or constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield. * * * At times it has not been clear whether the particular activity regulated by the states was governed by §7 or §8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. What is outside the scope of this Court's authority cannot remain within a state's power and state jurisdiction too must yield to the exclusive primary competence of the Board. * * * It is not for us to decide whether the National Labor Relations Board would have, or should have, decided these questions in the same manner. *When an activity is arguably subject to §7 or §8 of the Act, the states as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.* To require the states to yield to the primary jurisdiction of the National Board does not ensure Board adjudication of the status of a disputed activity. If the Board decides, subject to appropriate federal judicial review, that conduct is protected by §7, or prohibited by §8, then the matter is at an end, and the states are ousted of all jurisdiction." (Emphasis added.)

The failure of the Board to define the legal significance under the Act of a particular activity does not give the states the power to act. The controlling consideration, announced in *Garmon*, is that to allow the states to control activities that are *potentially* subject to federal regulation involves too great a danger of conflict with National Labor policy. However, the fact alone that the National Labor Relations Board has not adjudicated the status of the con-

duct involved does not mean that the state courts cannot act. We construe the *Garmon* case to mean, and we so hold, that if the activity in question is not *arguably* within the compass of §7 or §8 of the Act, the state's jurisdiction is not displaced even though the Board has not adjudicated the status of the activity. To hold otherwise would unduly frustrate the state courts in the exercise of their right to adjudicate issues properly within the jurisdiction of such courts. The very fact that the dividing line between what is reasonably arguable and what is not is oftentimes difficult to determine is a cogent reason for basing the determination upon the particular facts of each given case. At the time of the picketing made the basis of the temporary injunction, Relator's union, National Maritime Union (hereinafter called NMU), represented the seamen employed by the American Oil Company on its seagoing tankers. After going on strike for a new contract NMU set up picket lines at, among other places, American's refinery at Texas City, Texas. The employees of the refinery were represented by another union, Oil, Chemical & Atomic Workers Union, Local 4-449 (hereinafter called "OCAW"). OCAW and American at the time had a valid, subsisting labor agreement containing a no-strike clause, and there was no labor dispute at the refinery. Although aware of the existence of this no-strike agreement, NMU picketed the gates of the refinery used by the OCAW employees, *with the intention of inducing such employees to honor the picket line, thereby breaching their contract.* Article 2 of this contract reads:

> "There shall be no strikes or stoppages of work by the Union, or lockouts by the Company, so long as this agreement is in effect."

A primary purpose, as found by the trial court, of the NMU and of Sherman D. George, the Relator (whose duties included supervising NMU pickets in Galveston County,

Texas), *in posting pickets at the Main Gate and the Grant Avenue Parking Lot Gate of the American Oil Company refinery, and a natural and probably consequence thereof, was to secure the disregard, breach or violation by OCAW, and by all or substantial numbers of the production and maintenance employees of the American Oil Company at its Texas City refinery of the valid and subsisting labor agreement that was then in force between them.*

There was no dispute as to the evidence introduced at the hearing on the temporary injunction relating to the irreparable effects of work stoppage by OCAW at the refinery. The refinery operates continuously, 24 hours a day, 7 days a week. It supplies products essential to the operation of several other plants in Texas City, and such plants have no readily available substitute source for these materials. The continuous operation of the plant depends on the presence of OCAW production and maintenance workers on each eight-hour shift, and if a substantial part of any shift had honored NMU's picket line it would have necessitated shutting down the entire operation. The evidence further shows that shutting down the refinery is a complicated, time-consuming, and extremely dangerous procedure. It would have required at least a week to bring the refinery back to full production following a shutdown, and would have required several months to return to normal operations because of the inevitable disruption in schedules and loss of business. The evidence amply supports the trial court's findings that at the time the injunction was granted there was a clear and present danger of irreparable harm and damage resulting had the picketing of the Main Gate and the Grant Avenue Parking Lot Gate not been restrained by injunction. In spite of this certain result, the Relator, George, publicly announced that he intended to violate the provisions of the injunction, — this, solely because he did not believe that the trial court had

jurisdiction to issue the injunction. It should be noted that the injunction here involved was limited in its terms to picketing at the Main Gate and at the Grant Avenue Parking Lot Gate, which gates were used exclusively by employees of The American Oil Company, including those represented by OCAW. The injunction did not in any manner interefere with George or any others picketing at the other four gates of the refinery. These gates were used by employees of independent contractors working at the refinery, which gates are referred to as the "construction gates". With reference to the construction gates, American filed a charge with the National Labor Relations Board alleging that NMU was engaged in secondary picketing in violation of Section 8, (b)(4)(B) of the Act (29 U.S.C.A., Sec. 158 (b)(4)(B) by picketing the four construction gates. The National Labor Relations Board filed a complaint under Section 10(1) of the Act to enjoin NMU's picketing of only the four construction gates. This charge was based on the theory that such picketing induced or encouraged the employees of certain building contractors to engage in a work stoppage. This controversy was settled and a stipulation was filed in Civil Action No. 2783 in the United States District Court, whereby without admitting any violation of the Act, NMU agreed not to picket the construction gates so long as they were maintained for the exclusive use of employees of the independent contractors.

Relator, George, insists that since American invoked the jurisdiction of the National Labor Relations Board over the dispute with reference to the construction gates, the Board also has exclusive jurisdiction over the activity in picketing the Main Gate and the Grant Avenue Parking Lot Gate. With this we cannot agree. The matters involved in the complaint filed by the National Labor Relations Board in no manner had reference to the Main Gate and

the Grant Avenue Parking Lot Gate, but only had reference to the four construction gates. That complaint had nothing to do with the injunction suit filed by American to enjoin Relator, George, from picketing the Main Gate and Grant Avenue Parking Lot Gate, and thereby bring about a breach of the contract above mentioned.

George argues that no OCAW member employed by American actually refused to cross the NMU picket line, and that no violence attended the picketing. The fact that the picketing was without violence, and that no OCAW member actually refused to cross the NMU picket line does not necessarily mean that the temporary injunction was improvidently granted. The evidence is sufficient to support the trial court's action in granting the injunction if it shows that the purpose of the picketing was to directly or indirectly secure the disregard, breach, or violation by OCAW members of a valid subsisting labor agreement. The evidence of the activity of Relator, George, in the picketing of the two gates shows that this test was met, and supports the trial court's unchallenged finding that such activity was in direct violation of Article 5154d,[3] Vernon's Annotated Civil Statutes. George admitted that he deliberately did what the statute prohibits. His position presents a facet of the problem of federal pre-emption of jurisdiction over labor activity, which has not been previously considered by this Court. Certainly, the precise question was not presented in either the Twedell or Dilley cases. We have here a situation where the Relator, George, deliberately set about to picket and thereby cause a breach of a labor agreement between the American and OCAW.

[3] "* * * picketing, the purpose of which, directly or indirectly, is to secure the disregard, breach or violation of a valid subsisting labor agreement arrived at between an employer and the representatives designated or selected by the employees for the purpose of collective bargaining, or certified as the bargaining unit under the provisions of the National Labor Relations Act."

The case of Grunwald-Marx v. Clothing Workers, 52 Cal 2d 568, 343 P. 2d 23 (1959), by the California Supreme Court, supports our conclusion that the labor activity here is neither protected nor prohibited by the National Labor Relations Act. In that case, the Court held that its jurisdiction to confirm an arbitration award in favor of an employer was not pre-empted by the Act, even though the employer had filed charges with the Board alleging the Union had failed to bargain in good faith on the controversy underlying the arbitration case. The Court's reasoning on the pre-emption issue is sound. The Court said:

> "As already pointed out, in the instant case the state action charges the breach of an express term of a collective bargaining agreement. Such conduct does not involve a violation of sections 7 or 8 of the Act. The refusal to bargain collectively, which is the gist of the proceeding before the National Labor Relations Board, is involved, at most, indirectly in the state action. There is no obvious conflict between them. The Union contends that whenever there is a mere possibility of potential conflict between the substantive law, remedies or procedures of the state and federal authorities, the National Labor Relations Act pre-empts jurisdiction. That assertion is too broad. The real test is to ascertain the nature of the activity or conduct that is involved. The Supreme Court of the United States was most careful to point out that in cases of violent conduct or threats to the peace, state courts have jurisdiction. Reference is also made to an area 'where the activity regulated was a merely peripheral concern of the Labor Management Relations Act.' These are referred to as situations touching interests 'deeply rooted' in 'local feeling' or 'responsibility.' As to these, state jurisdiction is retained. It is true that Garmon held that when 'an activity is arguably subject to § 7 or § 8 of the Act' the Board has exclusive jurisdiction in the first instance. But certainly by using the term 'arguably' Mr. Justice Frankfurter did not mean to imply that a litigant can cause a state court to lose jurisdic-

tion merely by the assertion that the particular activity is either protected by § 7 or prohibited by § 8. He must have meant 'susceptible of reasonable argument.' Otherwise, completely specious claims of activities within Board jurisdiction would automatically deprive state court of jurisdiction until the Board has acted. No such result was intended. The fact that the dividing line between what is reasonably arguable and what is not, may, in some cases, be difficult to determine, is no reason for refusing to make the determination. Courts constantly make such determination. No doubt close cases should be determined, in the first instance, to fall exclusively within Board jurisdiction. But this is not such a case.

"Our analysis of the conduct here involved has already been stated. The 'activity arguably subject to § 7 or § 8 of the Act,' to use Mr. Justice Frankfurter's words in Garmon, is entirely distinct from the activity constituting the breach of contract. State court or arbitration resolution of the alleged breach of contract will not conflict with Board action on the alleged unfair labor practice. Indeed, the state does not purport to regulate the latter. A Board ruling that there has not been a refusal to bargain is not inconsistent with an award of damages or other relief for a breach of contract, and conversely, a Board ruling that there has been a refusal to bargain is not in conflict with a judicial determination or determination by an arbitration board that the contract has not been breached.

"We emphasize that this is not a situation where the same act constituting a breach of contract is also an unfair labor practice. As to such a situation we express no opinion.

"Conflict between state and federal jurisdiction, actual and potential, is the theme of Garmon. Lack of such conflict necessarily precludes the possibility of pre-emption. State court enforcement of the contract breach is consonant and not inconsistent with the national policy of industrial relations. At the very most, the contract breach '[is] a merely peripheral concern'

of the federal statute. * * *." See also Retail Clerks Union v. Superior Court, 52 Cal. 2d 222, 339 P. 2d 839 (1959), cert. den. 361 U.S. 864 (1959).

Relator refers to our opinion in *Ex Parte Dilley, supra,* wherein we said: "There now seems to be four means or circumstances under which a state court will be held to have power to regulate, although it would not or might not otherwise be empowered in light of federal pre-emption." He contends that none of the four circumstances exist in the instant case. It should be noted that the four means or circumstances we mentioned were stated in more or less general terms. We did not mean to place a limitation upon the circumstances under which a state court will be held to have power to regulate. However, an activity which is designed to secure the disregard, breach, or violation of a valid and subsisting labor agreement, falls well within circumstance "(2) where the activity is of merely 'peripheral concern' of the Labor Management Relations Act, * * *." This simply means that the instant case falls in a class where pre-emption does not apply. A bare assertion of pre-emption did not and does not oust a state court of jurisdiction. This case is one in which Relator's claim of pre-emption is not "susceptible of reasonable argument". *Grumwald-Marx, Inc. supra.*

We find no basis for denying to Texas the power, in governing her internal affairs, to regulate a course of conduct about which the National Labor Relations Board, at most, merely has a "peripheral concern". We find nothing in the Act which can be regarded as protecting concerted activities which have as their purpose possible and probable inducement of breach of contract. The activities in the instant case, neither being protected nor prohibited by the Act, do not fall within any of the categories in which the United States Supreme Court thus far has said a state

court may not act. See *Auto Workers v. Wisconsin Board*, 336 U.S. 245, 265, 23 LRRM 2361 (1949).

The order adjudging Relator, Sherman D. George, guilty of contempt of court, rendered by The Honorable Donald M. Markle, Judge of the Tenth District Court of Galveston County, Texas, adjudging that Sherman D. George be imprisoned in the County Jail of Galveston County, Texas, without bail, for a period of seventy-two (72) hours, and until a fine of $100.00 is paid, or until discharged by further order of the Court, is not void. Therefore, Relator, George, is remanded to the Sheriff of Galveston County, Texas, until he has served the seventy-two (72) hours and paid the $100.00 fine, as ordered by the trial court.

(Signed) CLYDE E. SMITH
Clyde E. Smith
Associate Justice

I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, do hereby certify that the foregoing fifteen pages contain a true and correct copy of the Opinion of the Supreme Court of Texas in the case of Ex Parte Sherman D. George, No. A-8518, as such opinion appears of record now on file in this office.

IN TESTIMONY WHEREOF, witness my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 8th day of August, 1962.

GEO. H. TEMPLIN, *Clerk*
By CARL B. LYDA, *Deputy*

(SEAL)

IN THE

Supreme Court of Texas

No. A-8518.

May 30, 1962.

EX PARTE
SHERMAN D. GEORGE } ORIGINAL HABEAS CORPUS.

Relator's motion for rehearing, filed in the above numbered and entitled cause on January 17, 1962, having been duly considered by the Court, it is ordered that said motion be, and hereby is, overruled.

(Dissenting Opinion on motion for rehearing by Robert W. Calvert, Chief Justice, in which James R. Norvell, Associate Justice, joins.)

I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the Order of the Supreme Court of Texas on motion for rehearing in the case of Ex Parte Sherman D. George, No. A-8515, as such order appears of record in the minutes of said Court under date of May 30, 1962.

IN TESTIMONY WHEREOF, witness may hand of the seal of the Supreme Court of Texas, at the City of Austin, this, the 8th day of August, 1962.

GEO. H. TEMPLIN, *Clerk*

By CARL B. LYDA, *Deputy*

(SEAL)

IN THE

Supreme Court of Texas

No. A-8518.

January 3, 1962.

EX PARTE
SHERMAN D. GEORGE } ORIGINAL HABEAS CORPUS.

This cause came on to be heard on petition for writ of habeas corpus, filed herein on July [illegible] 1961, and said petition, together with the record and [illegible]s and argument of counsel, having been duly considered, because it is the opinion of the Court that the judgment of contempt and commitment rendered and entered by the Honorable Donald M. Markle, Judge of the Tenth District Court of Galveston County, Texas, in the case of The American Oil Company v. National Maritime Union of America, AFL-CIO, et al., No. 96,705 on the docket of said Court, on the 6th day of July, 1961, was, and is, valid and subsisting, it is therefore *adjudged, ordered* and *decreed* that the writ of habeas corpus granted and issued herein on July 10, 1961, be, and hereby is, annuled and set aside, and that relator, Sherman D. George, be, and hereby is, remanded to the custody of the Sheriff of Galveston County, Texas, to be kept and imprisoned in the jail of said county until he has served the sentence and paid the fine in accordance with the above mentioned judgment of contempt and commitment rendered and entered by the Honorable Donald M. Markle, Judge, or until the further orders of said court.

It is further ordered that relator, Sherman D. George, pay all costs in this cause expended and incurred in this Court.

(Opinion of the Court by Associate Justice Smith).

I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, do hereby certify that the foregoing one page contains a true and correct copy of the Judgment of the Supreme Court of Texas in the case of Ex Parte Sherman D. George, No. A-8518, as such judgment appears of record in the minutes of said Court under date of January 3, 1962.

IN TESTIMONY WHEREOF, witness my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 8th day of August, 1962.

GEO. H. TEMPLIN, *Clerk*

By CARL B. LYDA, *Deputy*

(SEAL)

IN THE

Supreme Court of Texas

No. A-8518.

EX PARTE SHERMAN D. GEORGE } ORIGINAL. HABEAS CORPUS.

ON MOTION FOR REHEARING DISSENTING OPINION

Further consideration of this matter has convinced me that relator should be discharged. Being thus convinced, I must dissent.

One may not be punished for contempt for violating a void court order, and a temporary injunction granted by a court having no jurisdiction of the subject matter is void. Ex Parte Twedell, 158 Tex. 214, 309 S.W. 2d 834; Ex Parte Dilley, 160 Tex. 522, 334 S.W. 2d 425.

There is in the record ample evidence to support the trial court's finding that a primary purpose of the picketing of the refinery at Texas City by NMU members was to induce OCAW members to breach their contract with their employer, and the finding is not questioned by Relator. The picketing was, therefore, in direct violation of Sec. 4 of Article 5154d, V.A.T.C.S., and of the public policy of this state as declared by that statute. It is my considered judgment, however, that the District Court was without jurisdiction to enjoin the picketing, however unlawful under state statute its primary purpose may have been.

It is now too well settled to admit of serious question, or to require citation of decided cases, that exclusive primary jurisdiction of labor-management controversies involving activities protected by Section 7 or prohibited by

Section 8 of the Labor Management Relations Act, Title 29, §§157, 158, U.S.C.A., is preempted to and vested in the National Labor Relations Board. The preemption extends not only to controversies involving those activities which are expressly or clearly protected or prohibited, but as well to controversies involving those which *arguably* may be protected or prohibited. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775.

The majority here, using language from Grunwald-Marx, Inc. v. Los Angeles Joint Board, Amalgamated Clothing Workers of America, 52 Cal. 2d 568, 343 P. 2d 23, which in turn quotes from San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244, 79 S. Ct. 773, 3 L. Ed. 2d 775, conclude that jurisdiction to control the concerted activity by NMU is not preempted because the matter at issue is a merely *peripheral concern* of the Labor Management Relations Act. I can find no sound basis for that conclusion.

The statement of the Supreme Court of the United States that jurisdiction is not preempted in matters of merely peripheral concern of the LMRA must be interpreted in the factual context in which it was made. It was not intended as an escape phrase for ceding to state courts jurisdiction to control peaceful picketing. The statement was made in referring to International Assoc. of Machinists v. Ganzales, 356 U.S. 617, 78 S. Ct. 923, 2 L. Ed. 2d 1018, in which it was held that jurisdiction of state courts to award damages to a member against his union for wrongful expulsion had not been preempted. It was pointed out in the opinion in *Gonzales* that "the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied"; that "The National

Labor Relations Board could not have given respondent the relief that California gave him according to its local law of contracts and damages," and that the possibility of conflict with remedies afforded under the LMRA was "remote". The predicate for denying preemption in *Gonzales* does not exist in this case. Far from being of merely peripheral concern, regulation of strikes and picketing is the very heart of the Labor Management Relations Act.

There is far more to the second *Garmon* decision than reference in the opinion of the majority to matters of "peripheral concern". Not a single Justice of the Supreme Court dissented from the conclusion that the courts of California had no jurisdiction to adjudicate the issues raised in the case. The Court divided five to four on the proper basis for the conclusion. Mr. Justice Frankfurter wrote the opinion for the Court and Mr. Justice Harlan wrote the opinion for the concurrers. Because the division in the Court is so precarious, it may be well to consider the issue in this case in the light of both opinions.[1]

The controlling part of the Frankfurter opinion, as relevant to a decision of the issue of jurisdiction in this case, is found in the following language (359 U.S. 244-246, 3 L. Ed. 2d 783-784):

> "At times it has not been clear whether the particular activity regulated by the States was governed by §7 or §8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. *It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. What is outside the scope of this Court's authority cannot remain within a State's power and state jurisdiction*

[1] There is an excellent analysis of the two opinions by Charles O. Gregory, Professor of Law at the University of Virginia, in 46 Va. Law Review 539. See also case note in 58 Mich. Law Review 288.

too must yield to the exclusive primary competence of the Board. [cases cited] * * *

"To require the States to yield to the primary jurisdiction of the National Board does not insure Board adjudication of the status of a disputed activity. If the Board decides, subject to appropriate federal judicial review, that conduct is protected by §7, or prohibited by §8, then the matter is at an end, and the States are ousted of all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States. * * * *In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction.* * *"

The injunction put upon us by that clear and unmistakable language is to yield to the NLRB primary jurisdiction to decide whether a particular labor-management activity is protected or prohibited by the LMRA *unless* it has already been decided by "compelling precedent" that it is neither. As I read the Court's language, in the absence of "compelling precedent" that a particular activity is neither prohibited nor protected, primary jurisdiction to decide whether it is one or the other, or neither, rests with the NLRB. We are not told what is regarded as "compelling precedent". To me it means a decision by the Supreme Court of the United States or such a series of unreversed or unchallenged decisions by the NLRB of the identical question that the decisions are accepted as foreclosing the question. Assuming that is a close approximation of what the Court means by "compelling precedent", it would perhaps suffice as a dissent to observe at this point that the NLRB was not afforded an opportunity to decide whether the activity enjoined by the trial court is prohibited or

protected by the LMRA, or neither, and there is no compelling precedent establishing that it is neither. That, or its equivalent, is, in my judgment, about all the Supreme Court of the United States would say if this case were before it for decision. However, since The American Oil Company strenuously challenges the correctness of that conclusion, I am inclined to do more than state it as an ipse dixit.

The only prohibitory provisions of the LMRA which seem in the least applicable are Section 8 (b)(1)(A) which makes it an unfair labor practice for a labor organization or its agents to coerce employees in the exercise of the right given them by Section 7 *to refrain* from engaging in "concerted activities for the purpose of collective bargaining or other mutual aid or protection," and Section 8 (b)(4)(i)(B) which makes secondary picketing an unfair labor practice.

The trial court found, that "a natural and probable consequence" of the picketing, if continued, would have been a breach by substantial numbers of OCAW members of their contract. It might seem that an activity which would have such coercive effect on the minds of men as to cause them to breach a contract and thereby become subject to discharge, N.L.R.B. v. Rockaway News Supply Co., 345 U.S. 71, 73 S. Ct. 519, 97 L. Ed. 832, would fall within the prohibition of Sec. 8 (b)(1)(A), but the Supreme Court of the United States has held, in a slightly different factual context, that peaceful picketing is not coercive within the meaning of that Section. National Labor Relations Board v. Driver, Chauffeurs, Helpers, Local Union No. 639, etc., 362 U.S. 274, 80 S. Ct. 706, 4 L. Ed. 2d 710. There is a compelling precedent, therefore, for holding that the picketing is not prohibited by Section 8 (b)(1)(A).

Whether it is prohibited by Section 8 (b)(4)(i)(B) is not quite so free of doubt. While here, again, the picketing seems to be within the literal wording of the definition of

the unfair labor practice[2] if we regard the companies as separate legal entities, it is generally held that the prohibition is directed at secondary activity and is designed for the protection of neutrals. The finding of the trial court negatives the status of The American Oil Company as a neutral. The finding is: "The American Oil Company is a wholly owned subsidiary of American Oil Company, a Maryland Corporation, and said American Oil Company, a Maryland Corporation, directs and controls all of the activities of said The American Oil Company and its Texas City, Texas, Refinery." The finding is unchallenged and undisputed.

In the only factually similar case my research has disclosed, the United States Court of Appeals for the 7th Circuit held that picketing of a wholly-owned subsidiary was not prohibited by Section 8 (b)(4)(A), the applicable provision before amendment of the Act in 1959. See Milwaukee Plywood Company v. N.L.R.B., 285 F. 2d 325. The same conclusion was reached by the United States District Court for the Eastern District of Wisconsin in the same controversy. See Madden v. Warehouse and Mail Order Employees Union, International Brotherhood of Teamsters, etc., 36 Labor Cases 65,708. The opinions disclose that the N.L.R.B. thought the activity was not prohibited. In that case there was evidence of control by Aetna of practically

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[2] "(b) It shall be an unfair labor practice for a labor organization or its agents — (4) (i) * * * to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services * * * where * * * an object thereof is — * * * (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, * * * *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;"

all operational details of Milwaukee's business, including control of its policy in dealing with the picketing. In somewhat analogous fact situations where evidence of control was not so conclusive, Courts of Appeals have reached a different conclusion from that reached in *Aetna-Milwaukee*. In Bachman Machine Company v. N.L.R.B., 8th Circuit, 266 F.-2d 399, the Court, with one Judge dissenting, held that a union representing the employees of a family-owned corporation committed an unfair labor practice in violation of Section 8 (b)(4)(A) when it picketed the separate place of business of another corporation whose stock was wholly owned by the same family and whose employees were represented by a different union. There was considerable evidence of common control, but the Court concluded that the "evidence fell short of establishing that both companies were under such actual common management or control as to make them allies and a single employer for the purposes of Section 8 (b)(4)(A) of the Act." To the same effect, see J. G. Roy & Sons Company v. N.L.R.B., 1st Circuit, 251 F. 2d 771. As holding that picketing of a separate employer who is an 'ally' of the primary employer does not violate Section 8 (b)(4)(i)(B), see N.L.R.B. Business Machine, *etc.*, 2nd Circuit, 228 F. ed 553. The cases on the subject would seem to lead to a fairly firm conclusion that picketing by a union representing employees of one corporation of the premises of a second corporation is not a violation of Section 8 (b)(4)(i)(B) if the businesses of the two corporations represent a "straight-line" operation or if the activities of the two corporations are under common ownership and actual common control. Irwin-Lyons Lumber Co., 87 N.L.R.B. 54.

In this case the trial court found, and it is uncontroverted, that The American Oil Company is a wholly-owned subsidiary of American Oil Company and that *all* of its activities, presumably including labor activities, were directed and controlled by the parent corporation. Based on the cases

noted, I am inclined to the opinion that picketing of The American Oil Company refinery by NMU was not prohibited by Section 8(b)(4)(i)(B), but I have found no compelling precedent to that effect. The question remains as to whether there is any compelling precedent for holding that the picketing is not protected by Section 7 which guarantees to employees and their union the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."

It is to be remembered that the picketing was entirely peaceful. There was no violence or mass picketing, no name-calling, threats or incitement to violence, no physical blocking of entrances and exits or of public passageways. The only possible basis for concluding that the activity is not protected is the finding that "a primary purpose" of the picketing was to induce OCAW member-employees to breach their contract.

In just what sense the trial court used the words, "a primary purpose," is not entirely clear from the findings of fact and conclusions of law, but analysis will make it clear. The word "primary" may mean first in order of time, immediate, or it may mean first in order of rank or importance, principal. In the use of the phrase the trial court obviously referred to the "immediate" purpose, for it goes without saying that the "principal" purpose of the picketing was to exert pressure on American Oil Company and thus to force settlement of the labor dispute between the employer and NMU.

I have found no case by either the federal courts or the N.L.R.B. in which it has been held that the protection afforded by Section 7 does not shield the activity of a labor union representing one group of employees, who have a labor dispute with their employer, in peacefully picketing the employer's place or places of business where other employees, represented by a different bargaining agent and having a no-strike, no-work-stoppage contract, are work-

ing. The majority cite no such case and neither does respondent, The American Oil Company. The cases relied on as persuasive by The American Oil Company fall into two categories. Cases in the first category need not be cited here. They are cases decided by the N.L.R.B. and United States Courts of Appeals which stand for the principle that Section 7 does not protect strikes or picketing by employees in breach of their own no-strike contract. We may accept those decisions as establishing the principle of law for which they stand. If in this case OCAW members had honored NMU's picket line, I would be inclined to say, on the strength of the cited cases, that such activity was not protected. But that is not the issue here. The cases in the second category were decided by state courts and while that fact alone disqualifies them as compelling precedents in my view, they are entitled to closer attention because they are closer to the issue in this case, and the Supreme Court of the United States may regard some state court decisions as compelling precedents. They are: Office Employees International Union, etc. v. Houston Lighting & Power Company, Tex. Civ. App., 314 S.W. 2d 315, writ refused, n.r.e.; Cooperative Refinery Association v. Williams, 185 Kan. 410, 345 P. 2d 709; Standard Oil Company v. Oil, Chemical & Atomic Workers Union, Ohio Ct. Common Pleas, 144 N.E. 2d 517; Gulf Refining Company v. Oil Workers International Union, Ohio Ct. Common Pleas, 114 N.E. 2d 534; M & M Wood Working Company v. United Brotherhood of Carpenters and Joiners, Oregon Circuit Ct., 26 Labor Cases 87, 545; American Brake Shoe Company v. Machinists Association, 373 Pa. 164, 94 A. 2d 884.

Standard Oil Company v. Oil, Chemical & Atomic Workers, Gulf Refining Company v. Oil Workers International Union, and M & M Wood Working Company v. United Brotherhood of Carpenters and Joiners, were, indeed, suits to restrain and enjoin labor organizations representing

the employees of one business of an employer from picketing another place of business of the same employer where the employees of the second business were represented by a different union and had a no-strike contract. In each case the state court granted the relief sought. But these decisions cannot be the type of *compelling* precedents of which *Garmon* speaks. With all due deference, they are decisions of trial courts, apparently the equivalent of our district courts, and all were made before *Garmon*.

American Brake Shoe Company v. Machinists Association was decided by the Supreme Court of Pennsylvania. The employer sought to enjoin representatives of employees of an employer's place of business in St. Louis, Missouri, from picketing the employer's place of business in Meadville, Pennsylvania, where the employees were represented by a different union and had a no-strike contract. The injunction was denied on the ground that it was prohibited by state statute. The court's statement that jurisdiction to grant relief had not been preempted to the N.L.R.B. was strictly a dictum. The court stated that there was no evidence before it that the employer was doing business in interstate commerce and that the question of jurisdiction had not been raised. The decision was also before *Garmon*.

Office Employees International Union v. Houston Lighting & Power Company was decided by the Austin Court of Civil Appeals. Representatives of the Office Employees Union established a picket line at a separate place of business of its employer, where employees were represented by other unions, because of discharge of an employee at the second place of business. State court jurisdiction to enjoin the picketing was upheld by the Court of Civil Appeals on more than one ground, one of which was that the purpose of the picketing was to induce employees at the second place of business to breach their no-strike contract in violation of Article 5154d. Our refusal of writ of error, no

reversible error, did not constitute approval of that holding. Moreover, this is also a pre-Garmon decision.

Cooperative Refinery Association v. Williams is a post-Garmon decision by the Supreme Court of Kansas. The court upheld jurisdiction of the state courts to enjoin peaceful picketing over protest that the picketing was either protected by Section 7 or prohibited by Section 8. The Teamsters Union, representative of employees of Consumers Cooperative Association, a Kansas corporation with its office and place of business in Kansas City, Missouri, established a picket line at the place of business in Lawrence, Kansas, of The Cooperative Farm Chemicals Association, also a Kansas corporation, whose employees were represented by Oil, Chemical and Atomic Workers Union. Consumers Cooperative Association owned 75% of the stock of The Cooperative Farm Chemicals Association and the same individual was president of both corporations. The court held that the picketing was not protected because there was no evidence that the first corporation controlled the second or even that they were doing business with each other. That finding is the exact opposite of the finding in the case before us. The Kansas court held that the picketing was not prohibited because the picketing union "had no intention of inducing, encouraging or persuading such employees [of the second corporation] to engage in any concerted or other activity * * *." Here, again, the finding is the exact opposite of the finding in the case at bar. While this case can hardly be persuasive in deciding the merits of the issue before us, it does support jurisdiction of the state courts to decide it.

One other state decision deserves mention although it cannot be regarded as of controlling significance. In Dooley v. Anton, 8 N.Y. 2d 91, 168 N.E. 2d 356, decided after second *Garmon*, the New York Court of Appeals held that the effect of the Garmon decision was to oust jurisdiction of state courts to enjoin picketing for the purpose of

coercing the employer into breaching his contract with another union which represented a majority of his employees. The Court concluded that *Garmon* required that primary jurisdiction to decide whether the activity was protected or prohibited be left to the N.L.R.B. The court overruled an earlier decision that the identical activity was neither protected nor prohibited and that the state courts therefore had jurisdiction to enjoin it. The opinion is weakened by the fact that at the time the court decided the case the LMRA had been amended to make recognition picketing an unfair labor practice, thus expressly bringing regulation of the activity within the exclusive jurisdiction of the N.L.R.B.

It seems quite clear to me that the District Court was without jurisdiction to grant the temporary injunction if its jurisdiction is tested by the opinion of the majority in second *Garmon*. I am also satisfied that the court was without jurisdiction if its jurisdiction is tested by the opinion of the concurring Justices. The sense of the concurring opinion, as I understand it, is that when it is clear *to a state court* that an activity is neither protected nor prohibited by the LMRA the court should be permitted to take jurisdiction to control the activity, subject to review of the correctness of its determination by the Supreme Court of the United States, even though the question has not been submitted to or decided by the N.L.R.B. The concurring Justices joined in approving the Court's judgment in second *Garmon* solely because it was "fairly debatable" whether the conduct involved was protected. On the basis of the decisions reviewed above, I would be forced to conclude that it is fairly debatable whether the picketing by NMU is prohibited and also fairly debatable whether it is protected. Thus I would be forced to conclude here, as did the concurring Justices in *Garmon*, that the District Court was without jurisdiction to grant the injunction. Particularly would I be compelled to do so

considering that The American Oil Company had a remedy to protect itself against harm by obtaining a state court injunction against breach by OCAW member-employees of their no-strike, no-work-stoppage contract. Teamsters Union v. Lucas Flour Company, 82 S. Ct. 571, 7 L. Ed. 2d 593; Dowd Box Co. v. Courtney, 7 L. Ed. 2d 483; McCarroll v. Los Angeles Dist. Council of Carpenters, etc., 49 Cal. 2d 45, 315 P. 2d 322; McLean Distributing Co. v. Brewery and Beverage Drivers, etc. 254 Minn. 204, 94 N.W. 2d 514; Philadelphia Marine Trade Ass'n. v. International Longshoremen's Ass'n., etc., 382 Pa. 326, 115 A. 2d 733.

It seems clear to me that late decisions of the Supreme Court of the United States in labor cases indicate two definite trends. These trends are noticed also by Jeffers in his article in 36 T.L.R. 938. The first trend is represented by such cases as International Brotherhood of Teamsters v. Vogt, 354 U.S. 284, 77 S. Ct. 1166, 1 L. Ed. 2d 1347, and is toward a broadening of the power of the states to curb peaceful labor activity against employers in intrastate business when the activity violates basic public policy of the states, whether the policy be enunciated by the state legislature or by the judiciary. The process is one of limiting the broad sweep of such cases as Thornhill v. Alabama, 310 U.S. 88, 60 S. Ct. 736, 84 L. Ed. 1093, in the protection of the constitutional guaranty of free speech. It is in this field that the *purpose* of the activity is of all-controlling importance. The second trend is represented by such cases as the two *Garmon* decisions and is toward a narrowing of the jurisdiction of state courts to curb or control peaceful labor activity against employers in interstate business. The process is one of excluding state jurisdiction in this field until the N.L.R.B. has first made a definitive determination that the activity is neither protected nor prohibited by the Labor Management Relations Act or until the Supreme Court has decided the same issue in a case

properly before it. In this area the *purpose* of the activity is not of such major consequence, at least until the question of jurisdiction of the activity has been determined to be in the courts. Cases decided by the Supreme Court since second *Garmon* confirm this latter trend. See Hotel Employees v. Sax Enterprises, 358 U.S. 270, 79 S. Ct. 273, 3 L. Ed. 289; Plumbers, etc. v. County of Door, 359 U.S. 354, 79 S. Ct. 844, 3 L. Ed. 2d 872. It was recognized by this court in Ex Parte Twedell, 158 Tex. 214, 309 S.W. 2d 834, in which we held the state courts were without jurisdiction to enjoin peaceful picketing even though the purpose was to bring about a violation of state right to work laws.

Relator should be discharged.

(Signed) ROBERT W. CALVERT
Robert W. Calvert
Chief Justice

Opinion delivered May 30, 1962

Associate Justice Norvell joins in this dissent.

I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, do hereby certify that the foregoing thirteen pages contain a true and correct copy of the Dissenting Opinion by Robert W. Calvert, Chief Justice, in the case of Ex Parte Sherman D. George, No. A-8518, as such dissenting opinion appears of record now on file in this office.

IN TESTIMONY WHEREOF, witness my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 8th day of August, 1962.

GEO. H. TEMPLIN, *Clerk*

(SEAL) By CARL B. LYDA, *Deputy*

IN THE

Supreme Court of Texas

IN CHAMBERS

August 14, 1962.

No. A-8518.

EX PARTE
SHERMAN D. GEORGE } ORIGINAL HABEAS CORPUS.

Relator's motion to further stay writ of commitment, filed herein on August 11, 1962, having been duly considered by the Court in chamber, and it appearing therefrom that relator will file a petition for writ of certiorari to the Supreme Court of the United States in this cause in due time, it is ordered that said motion be, and hereby is, granted.

It is, therefore, further ordered that the Clerk of this Court do not issue a writ of commitment in this cause pending the orders of the Supreme Court of the United States on the petition for writ of certiorari or, if such writ is granted, pending the judgment and mandate of the Supreme Court of the United States in this cause.

I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the order of the Supreme Court of Texas on relator's motion to further stay writ of commitment in the case of Ex Parte Sherman D. George, No. A-8518, as such order appears of record in the minutes of said Court under date of August 14, 1962.

IN TESTIMONY WHEREOF, witness my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 15th day of August, A.D. 1962.

GEO. H. TEMPLIN, *Clerk*

(SEAL) By CARL B. LYDA, *Deputy*

Text of Labor Management Relations Act of 1947, 61 Stat. 136, et seq., 29 USC 157, 158(b)(4)(B)

Section 157:

"Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 158 (a) (3) of this title."

Section 158 (b) (4) (B):

"(b) It shall be an unfair labor practice for a labor organization or its agents —

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is —

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor or-

ganization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;"

Text of Acts 1947, 50th Leg., Ch. 138, p. 239, Vernon's Texas Civil Statutes, Vol. 15, Art. 5154(d)(4):

"It shall be unlawful for any person, singly or in concert with others, to engage in picketing, the purpose of which, directly or indirectly, is to secure the disregard, breach or violation of a valid subsisting labor agreement arrived at between an employer and the representatives designated or selected by the employees for the purpose of collective bargaining or certified as the bargaining unit under the provisions of the National Labor Relations Act."

Excerpts from the Record:

a. Motion to Dismiss at Hearing on Temporary Injunction:

(S.F.T.I., p. 48): "MR. WRIGHT: Your Honor, we would like to move the Court to dismiss the Plaintiff's law suit, for the reason that the evidence is undisputed that this corporation is engaged in interstate commerce, and that a labor dispute exists, and the Federal Government, through the Labor-Management Relations Act has preempted the field of labor disputes, in relation to companies engaged in interstate commerce — (at this point in the trial, attorneys present arguments concerning the Motion. By order of Mr. Wright, the attorney who ordered that this Statement of Facts be prepared, the arguments of Counsel are not included in this Statement of Facts)." (S.F.T.I., p. 91):

"COURT: Is there anything further for the record, at this time?

MR. LAMBDIN: There is nothing from the Plaintiff, Your Honor, for the record.

MR. WRIGHT: Nothing from the Defendant, Your Honor, except that the Defendant rests and re-urges its motion to dismiss for want of jurisdiction.

COURT: Alright. Then, we won't have anything more for the record."

b. Motion to Dismiss at Contempt Hearing (S.F. 49-50):

"MR. WRIGHT: On the evidence, the Defendants rest, and at this point, I would like to move the Court to dismiss this Application for Contempt, and to dissolve the temporary injunction heretofore granted, for the reason that under the terms of the Labor-Management Relations Act of the Federal Government and under the Constitutions of both the State of Texas and the United States, this Court lacks jurisdiction or power to issue the temporary restraining order, in the first instance, and to hold any of these Defendants in contempt under the restraining order, since the restraining order was issued without jurisdiction or power. Having argued this particular matter earlier, Your Honor — unless the Court would like to hear some further arguments, I would waive argument and would like to discuss with the Court for a moment, the matter of any penalty that the Court might assess for the violation of the injunction, if Your Honor feels that the motion ought to be overruled.

COURT: You have previously argued this question of jurisdiction, very thoroughly, and I have those arguments in my mind at this time, and so I don't see that there is anything to be served by going over that again. The motion is overruled and denied."

c. Petitioner's petition for a Writ of Habeas Corpus (5-6):

"The Court's order of temporary injunction and judgment of contempt and commitment are void. As

shown by the allegations of plaintiff's first amended original petition, the Union and its officers, including your petitioner, Sherman D. George, were charged with conduct which arguably is either proscribed or protected by the Labor Management Relations Act of 1947, as amended, (The Taft-Hartley Act), a statute of the United States Congress, and especially Sections 7, 8 and 9, Title 29, U.S.C.A., Sections 141-187 thereof. Plaintiff, The American Oil Company, a Texas corporation, is a *wholly owned* subsidiary of American Oil Company, a Maryland corporation, which *directs and controls* all of the activities of the said The American Oil Company, and its Texas City, Texas, Refinery. At all times material hereto, *American Oil Company* (the parent-controlling corporation) *was engaged in a labor dispute with its employees represented by Defendant National Maritime Union of America, AFL-CIO.* Both American Oil Company, and The American Oil Company, at all times material hereto, were engaged in commerce within the meaning of the National Labor Relations Act, as amended, and met the existing monetary jurisdictional standards of the National Labor Relations Board. (See Paragraph 16k, Findings of Facts attached) (Also Tr. pp. 33-34). The undisputed evidence showed further that plaintiff (Under direction and control of its parent corporation) exports seventy percent (70%) of its finished products by pumping it through pipe lines to the docks at Texas City, Texas, from where it is exported from Texas by deep sea vessels. (Statement of Facts, pp. 35, 38 and 39). The record submitted herewith shows that the parties in the subject injunction action are in businesses affecting interstate commerce and that they were engaged in a primary labor dispute within the meaning of the aforesaid federal statute. Therefore, jurisdiction of the parties and subject matter of the said action have been preempted by the said federal statute by the Congress of the United States in the exercise of its constitutional power to regulate or control interstate commerce. The Congress of the United States by said federal statute

has vested sole and exclusive jurisdiction or power to hear and determine and/or grant any remedies regarding the subject matter of said action in the National Labor Relations Board by and through the administrative and judicial procedure provided by said law."

d. Petitioner's Motion for Rehearing (Motion, p. 2, points 2 & 3)

"2. This Court erred in failing to hold that the picketing herein was arguably either protected or prohibited actively under the National Labor Management Relations Act.

3. This Court erred in failing to hold that primary jurisdiction to determine whether the picketing herein was either protected or prohibited, or neither, under the National Labor Management Relations Act lay with the National Labor Relations Board and not the State Court."

e. Petitioner's Petition for a Writ of Habeas Corpus (p. 7, point 6)

"The act of picketing and carrying a large sign advertising the complaints of the Union, which the 10th District Court enjoined, were all peaceful acts of free speech and free press privileged under and protected by Article I, Section 8, of the Constitution of the State of Texas, and by the First and Fourteenth Amendments to the Constitution of the United States. Petitioner, by the said injunction, by the judgment of contempt, and by his commitment and restraint of his liberty, has been and is being denied rights guaranteed by the Texas and United States Constitutions, and said laws of the United States. Petitioner contends further, and/or alternatively, said Article 5154d, Sec. 4, as applied against him in this case, is unconstitutional under said Constitutions, and Laws of the United States."

f. Petitioner's Motion for Rehearing (p. 3, point 7):

"The Supreme Court erred in failing to hold that the provisions of Article 5154d of Vernon's Annotated Civil Statutes as applied here is in contravention to the First Amendment of the Constitution of the United States and contravenes the provisions of the Constitution of the State of Texas, Article 1, Section 8, in that such statute as applied here illegally limits Relator's right to free speech guaranteed to him by the Constitution of the United States and that of the State of Texas."

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IN THE

Supreme Court of the United States

October Term, 1962

No: 375

EX PARTE GEORGE

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

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EX PARTE GEORGE

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Reasons Why The Petition Should Not Be Granted

(1) The Respondent must call to the attention of the Court that the Petitioner did not challenge the constitutionality of the Texas statute in his petition for a writ of habeas corpus. The issue was first raised in his petition for rehearing in the Supreme Court of Texas, and the petition was not entertained. Accordingly, the question is not before the Court. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128; *Consolidated Turnpike Co. v. Norfolk & O. B. Ry.*, 228 U.S. 326, 333-334; *Chicago, Ind. & L. Ry. v. McGuire*, 196 U.S. 128, 131-133.

(2) This decision was handed down by the Supreme Court of Texas prior to the decisions of this Court in

Charles Dowd Box Co. v. Courtney, 368 U.S. 502, and *Lucas Flour Co. v. Local 174, Teamsters' Union*, 369 U.S. 95, which confirm that State courts have not been deprived of their jurisdiction over labor management relations in interstate commerce except in cases where the pre-emption doctrine applies. That doctrine, *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, is conscientiously applied by the Supreme Court of Texas, see *Ex Parte Dilley*, 160 Tex. 522, 334 S.W. 2d 425, and the Petitioner does not even suggest that the Supreme Court of Texas is ignoring its obligations. Furthermore, no challenge was made to the injunctive relief given by the State court. Therefore, the issue reserved in *Charles Dowd Box Co., Inc. v. Courtney*, 368 U.S. 502, 514, as to whether the Norris-LaGuardia applies to the states, is not raised in this case. As a result, this important issue cannot be reached in this controversy.

(3) In an effort to make this case appear to be significant the Petitioner raises an abstract and hypothetical question not even involved: Can a state ban all picketing? The answer is quite clear. Of course no statute, state or federal, can ban all picketing without violating the guarantee of free speech found in the First Amendment and applied to the states through the Fourteenth. It is equally clear, however, that picketing involves more than mere speech, *Teamsters v. Vogt, Inc.*, 354 U.S. 284; *Bakery Drivers v. Wohl*, 315 U.S. 769, 776 (concurring opinion of Mr. Justice Douglas), and thus is subject to reasonable regulation by the Federal Government, principally through the Commerce Clause, and by the state governments through their police powers. The Congress, for example, prohibits even peaceful picketing to compel a secondary boycott (LMRA § 8(b)(4), as amended; 29 U.S.C.A.

§ 158(b)(4), to secure recognition in certain situations (LMRA § 8(b)(7), as amended; 29 U.S.C.A. § 158(b)(7), and to extort money from the employer (LMRDA § 602(a); 29 U.S.C.A. § 522. And this Court has upheld such statutes over challenges that the right of free speech had been infringed. *NLRB v. Denver Bldg. & CTC*, 341 U.S. 675; *Int'l Bhd. of Electrical Workers v. NLRB*, 341 U.S. 694. See *Local 761, IUE v. NLRB*, 366 U.S. 667.

This Court has also recognized that the states have a legitimate police power over picketing, so long as it is exercised reasonably and in furtherance of a valid state policy. In the words of this Court, there is

> "a broad field in which a State, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy." *Teamsters v. Vogt, Inc.*, 354 U.S. 284, 293.

That "broad field" includes all activity neither protected by § 7 nor prohibited by § 8 of the LMRA, as amended. *Auto Workers v. Wisconsin Board*, 336 U.S. 245. Examples of state policies limiting picketing which have been recognized by this Court include: policy against racial discrimination in employment, *Hughes v. Superior Court*, 339 U.S. 460; policy of equal purchasing opportunities, *Giboney v. Empire Storage Co.*, 336 U.S. 490; policy of equal employment opportunities, *Building Service Employees v. Gazzam*, 339 U.S. 532; policy against discrimination in employment based on union membership vel non, *Plumbers Union v. Graham*, 345 U.S. 192; policy against using pickets to collect a debt, *Bakery Drivers Union v.*

Wagshal, 333 U.S. 437; and the policy of channeling the picketing only against those directly involved in the dispute, *Carpenters Union v. Ritter's Cafe*, 315 U.S. 722.

Can anyone quarrel with a State's efforts to limit the militant aspects of picketing to the "front lines" of economic warfare? Is it not a valid public policy, for example, to prohibit altogether the picketing of the homes and families of those involved in an industrial dispute as is done in Colorado, Connecticut, Florida, Hawaii, Kansas, Michigan, and Utah?[1] See *Allen-Bradley Local v. Wisconsin Board*, 315 U.S. 740. Strikes and picketing are bitter enough experiences for the combatants. Innocent persons in the community, and especially those in other communities, unconnected with the economic warfare, should be spared.

The Texas statute (Art. 5154(d) § 4) here serves that same public policy. It did not interfere with the Maritime Union's striking and picketing at any primary situs of employment or at any dock where Respondent's ships might appear. It was only when the Maritime Union left the port, went to the mainland, and began picketing a refinery where there were neither ships nor sailors, much less members of the NMU, that the statute applied.[2]

As petitioner himself stipulated (Petition, p. 4a et seq), there was no labor dispute at this refinery. The refinery

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[1] Colorado Stats., § 94 (8)(2)(a); Connecticut Stats., § 31-120; Florida Stats., § 447.09(11); Hawaii Stats., § 11526; Kansas Stats., § 44-809(12); Michigan Stats., § 423.9(f); Utah Stats., § 34-1-8(2)(a). For convenience, refer to BNA-LRX, Strikes, Picketing and Boycotts, §§ 59, and BNA-SLL.

[2] Petitioner, recognizing the weakness of his position, seizes on the fact that there is a pipeline connection with some docks. But this pipeline connection is simply another method of transporting Respondent's products to its many customers, useful to the same extent as rail and truck transport.

workers had a collective bargaining agreement containing a no-strike clause which had been negotiated for them by their duly certified union, the Oil, Chemical & Atomic Workers International Union, AFL-CIO. The Maritime Union did not come to organize the refinery workers, to seek recognition, nor to protest unfair labor practices at the refinery. The purpose of the picketing was to induce the employees represented by Oil, Chemical & Atomic Workers to breach their collective bargaining agreement.[3]

It is well settled that breach of a collective bargaining agreement is not protected activity, *NLRB v. Sands Mfg. Co.*, 306 U.S. 332, 342-345, and neither is the refusal to cross a picket line, *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71. Breach of a collective bargaining agreement does not constitute an unfair labor practice under any of the subdivisions of § 8(b) of the LMRA, supra. See, e.g., *Textile Workers v. Lincoln Mills*, 353 U.S. 448; *Local 761, IUE v. NLRB*, 366 U.S. 667; *NLRB v. Drivers Local Union*, 362 U.S. 274. It follows that the NLRB does not have any jurisdiction in these instances. *Charles Dowd Box Co., Inc. v. Courtney*, 368 U.S. 502, 514; *Garner v. Teamsters' Union*, 346 U.S. 485. See *NLRB v. Insurance Agents Union*, 361 U.S. 477.

Thus, in this precise factual situation, after carefully considering the second *Garmon* case, supra, the Supreme Court of Texas correctly held that the NLRB did not even arguably have jurisdiction here. If the objective sought is not protected activity, it necessarily follows that the means used to achieve that objective are not protected. See *NLRB v. Local 1224, Electrical Workers*, 346

[3] For further details of petitioner's stipulation, see Petition p. 4a, 5a, 10a, 11a, 12a. See also Tr. 4, 5-6; S.F.T.I. 35.

U.S. 464. Inducing a breach of a no-strike agreement has been specifically held to be not protected by the NLRB. *Kraft Foods Company*, 108 NLRB 1164; *National Electric Products Corporation*, 80 NLRB 995; *Stockham Pipefittings Company*, 84 NLRB 629. See also *NLRB v. Kaiser Aluminum & Chemical Corporation*, 217 F. 2d 366 (C.A. 9); *Harnischfeger Corporation v. NLRB*, 207 F. 2d 575 (C.A. 7). Neither is this activity prohibited under any of the provisions of § 8(b), supra. Thus, the Texas policy, as expressed in this statute, came into play to prevent the Maritime Union from imposing their dispute on others in a different locale who were not involved in the maritime controversy.

Carpenters Union v. Ritter's Cafe, supra, is particularly significant here. There the Union wished to bring pressure to bear on employer of non-union labor at a construction site. Rather than picket that site, the Union instead picketed a restaurant owned by such employer at an entirely different location. The State enjoined that picketing, and this Court affirmed, stating:

> "Recognition of peaceful picketing as an exercise of free speech does not imply that the states must be without power to confine the sphere of communication to that directly related to the dispute." 315 U.S. at 728.

Conclusion

For the foregoing reasons this petition for certiorari should be denied.

BAKER, BOTTS, SHEPHERD & COATES

By _____

Attorney for Respondent

Certificate of Service

This is to certify that on the _____day of September, 1962, a true and correct copy of this Brief in Opposition was served upon Messrs. Mandell & Wright, 707 South Coast Building, Houston 2, Texas, and Messrs. Cooper, Ostrum, De Vacco & Ackerman, 655 Madison Avenue, New York, New York, by placing the same in envelopes addressed to each of them, postage prepaid by certified mail, and deposited in the United States mails.